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A
D E F E N C E
O F T H E
P R O C E E D I N G S
Of the Right Reverend
The V I S I T O R
A N D
F E L L O W S of *Exeter* College
I N
O X F O R D.

With an A N S W E R to

1. *The Case of EXETER College related and vindicated.*
2. *The Account Examined.*

A
D E F E N C E

OF THE

PROCEEDINGS

Of the Right Reverend

The Visitor

AND

FELLOWS of Exeter College

IN

OXFORD.

With an ANSWER to

1. The Case of EXETER College related and
indicated.

2. The account accompanying

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The P R E F A C E.

THE Cause of the late Rector of Exeter hath been defended with as little Reason and as much Rudeness as it was at first carried on; and yet after all these Affronts and Indecencies, the Visitation of the Bishop of Exeter was not more legal in it self, than the Proceedings after it have been just and honorable. When the late Rector, upon the plain proof of scandalous Crimes had justly been expell'd, and his removal wou'd have contributed to the quiet of the College, and to the peace and honor of the whole University; the Visitor however declin'd the exercise of that power, which in those private Societies his Predecessors have always us'd, and depriv'd him of his Office, not of his Possession. Of all the Heads of Colleges that ever were in that University, Dr. Bury is undoubtedly the first, who, after the Visitor's Sentence, enjoy'd the favour of an Ejection.

Some time after, as soon as the Bishop was inform'd that Dr. Bury expected Redress in the Courts of Westminster, He, upon his own motion, desir'd and obtain'd leave of waving his Privilege in the House of Lords. When afterwards the Cause depended before proper Judges in the Court of Kings-Bench, Mr. Painter, upon his Lordship's desire, endeavour'd to hasten the Tryal, and the other party, upon a just dis-

prevent it. These fair and honorable Procedures, which ought to have been prais'd and commended by an ingenuous Adversary, are nevertheless no fences against the malice of a weak and insolent Libel. The scandals, coming from such hands, neither need nor deserve an Answer, especially since they are level'd against a person who is much above the reach of those Calumnies.

The Interest, which the Visitor pursu'd, is already secur'd; the College which his Predecessors founded, is, by him, reform'd; and that Society which in respect of the Tenets there publish'd, and the Enormities there committed, was the disgrace of the University, is now a creditable Member at least, if not an Ornament to it.

The Duty which the Bishop ow'd to the Church and University, is already successfully discharg'd; the care and preservation of both is now happily entrusted to other hands. The powers that he executed were lodg'd in him by his religious Predecessor; He, by appointment, is sole Patron and Conservator of that Society, and represents the Founder in his College, as well as succeeds him in his Diocess.

The Heresie, Bribery, and other gross Immoralities, clearly prov'd upon the late Rector, occasion'd the Sentence, and after it the Censure, unanimously past by the whole University upon his blasphemous Book, sufficiently confirms and justifies the

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DEFENCE, &c.

MOST of those that have read the *Case of Exeter College related and vindicated*, are sufficiently convinc'd that so bad a Cause stood in need of better Advocates. The Pamphlet (as the Preface intimates) was design'd to draw over the *unthinking part of their Adversaries*, and whatsoever influence it may possibly have had upon them, it hath not fail'd of a contrary effect on the *thinking part of their Friends*. The only Art (if any) of the Discourse is, That it is intricate and confus'd, and perplexes the Cause which it cannot *refute*. And therefore the plain and direct Method of answering it, is to reduce the Controversie to a Point; and afterwards, in short, to consider the *wide and immaterial Exceptions* to it.

The single Point then now in Issue is, Whether Mr. Painter be Rector of Exeter College: His Admission must intitle him to that Office, and an Avoidance must preceed and warrant his Admission: If Dr. Bury then was rightly remov'd, there was room for a new Choice; And, since no other Objections are made, upon the lawfulness of his Expulsion the Validity of Mr. Painters Title depends. The most notorious *Herésie, gross Incontinence, and scandalous Bribery,*

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are admitted to be good Causes of Expulsion; but it is pretended that the *Bishop of Exeter* had no *Consuſance* of the Cause, and consequently no Power of inflicting the *Punishment*.

That the *Bishop* is *Ordinary Visitor*, and *Patron* of that College, is not to be deny'd, and that none else have any *Visitatorial* Power therein, is admitted: But a scruple is rais'd, whether, and how far this Power is subject to *Restrictions*, when it is *suspended*, and how *reviv'd*: What are the imaginary *Extent* and *Bounds*; When the absence and return of this *intermitting* Authority.

It is pretended then, that the *Bishop of Exeter*, tho' *Ordinary Visitor* of that College is barr'd from any Power of receiving Appeals, and is restrain'd from any other than a *Quinquennial* Visitation: And that therefore, upon the Execution of the Appeal by *Dr. Master* within the *Quinquennium*, the *Bishops* Authority of making a Visitation is determin'd.

To prove this Opinion, two Assertions must be laid down.

1. That the *Visitor of Exeter College* hath no Power of receiving Appeals.
2. That the Execution of a Commission of Appeal, amounts to a Visitation.

For if the *Visitor* had both Powers lodg'd in him, it is not pretended that the Execution of one determines the other; and therefore their Cause depends on the Truth of both; ours on the Falsity of either of these Propositions.

These Positions are so absurd in themselves, and so ill defended by the Promoters of them; that they are refuted

as soon as *explain'd*; and the whole Controversie will vanish at the same time that the Terms are settled. It will not be immaterial therefore to discourse of the true meaning and extent of the Words *Visitor*, *Ordinary*, *Appeal* and *Visitation*, and from thence to discover the gross Errors and Mistakes of the late Pamphlet.

And herein I must take leave to make use of not only the Authorities of *Common Law*, but in a great Measure to call in the Assistance of the *Canon*. For since the Statutes of Colleges have a necessary dependence on the *Ecclesiastical Laws*, since their Elections, Controversies, and Proceedings are regulated by *them*, since lastly Visitation it self, if it is not *now* always circumscrib'd to *Spiritual Societies*, was yet originally us'd in *Churches* only, and *Religious Places* and still pursues the usual Forms of the *Canon Law*; it is absolutely necessary, and is usual in the *Year Books*, in Cases of this Nature, to receive from the *Canonists* the Explanation of those Terms which are borrow'd from them. And therefore tho the late *Author* hath been pleas'd to *desie* the *Civil* and *Canon Law*, yet all judicious and learned Men are satisfied, that as it is much easier to condemn any Science than to attain it; so in a Cause of *Spiritual Consequence*, or which is nearly allied thereto, it is much better to *have Canon Law*, than to *want Common*: For if we look into the late Case we shall find, that this sworn Adversary to *Ecclesiastical Laws*, took not his Malice against them out of any great propensity to *Temporal*; and that Ignorance of *one part* of Learning is no certain pretence to *another*.

A *Visitor* then who is in Law, always the *Patron* of a Society, and a *Conservator* of the *Local Statutes* thereof is intrusted by Law to reform all *Abuses* and *Disorders* therein, and to *redress* all *Grievances* of the *Members* thereof.

The Appointment of this Person, who is to be *Visitor*, is the Act sometimes of the Law, and frequently of the *Party*: But when ever any Person by good Authority is made *Visitor*; the Law it self casts upon him all the *Powers* incident to, and necessary for the Discharge of that Office. A *Visitor* is a Term of as certain, and as determin'd, tho perhaps not of so well known a Signification, as an *Executor*; and therefore tho the nomination of the Person himself may be from the *Party*, the Authority is always ascertain'd by Law, the one is *ex Institutione*, the other *ex Provisione Legis*. And tho these Powers may be divided, and plac'd in several Persons, as *Visitors*, *Ordinary* and *Extraordinary*; yet where-ever any Person is constituted *sole Visitor*, and all others are expressly excluded; there the *General Appointment* vests him with all Authority requisite to the performance of his Duty. For if the Place be of necessity visitable, then the *Rights* of *Visitation*, where-ever they may be lodg'd, and to whomsoever transferr'd, cannot however be diminish'd, much less taken away. And therefore any *discretionary Rules* given to a Person who is confest'd to have the sole Authority of *Visitation*, ought to receive, especially if they fairly can, such an Interpretation as is consistent with the known Powers of a *Visitor*, and the Will of the *Founder*. For whosoever by plain Words constitutes a *Visitor*, and afterwards is conceiv'd by doubtful Expressions to
deprive

deprive him of the Power necessary for that Office, must either design to *transfer* this *reserv'd Authority* to some other, or for some time at least to *exempt* the Place from any *Visitation*. Now if the *Exemption* of such a Place from Visitation, for any time, upon any Grievance or Enormity committed, be repugnant to *Law*, and the letting in of another *Visitor*, be evidently contrary to the declar'd Will of the *Founder*; then it follows, that these restrictive Directions may and ought to be so construed, as may neither be repugnant to the *Will* of the *Founder*, nor derogatory to the *known Law* of the *Land*.

This *General Power* of *Visitors*, is not only (as will afterwards appear) allow'd in all Books *of Canon Law*; but is likewise frequently in the *Year Books*, and other Reports of *Common Law* *presum'd* and *acknowledg'd*.

Littl. Sect. 139. 'If they which hold their Tenements in *Frankalmoign* will not, or fail to do Divine Service; The Lord may not distrain, but may complain of this to their Ordinary or Visitor, praying him, that he will lay some Punishment and Correction; for this, and also provide, that such Negligence be no more done; and the Ordinary or Visitor of Right ought to do this: And Coke p. 96. Expounds of Right, *de Droit*, in the Right of his Office: And therefore that the Powers that belong to the Office of a Visitor, are such as can correct at any time all Failures and redress them.

a Fra. de Pav. de Vis. Marianus Soc. de Vis. Zerola, v. Vis. Mendo de Jure Acad. de Vis. Acad. Chopin. de Monast. & de eorum Vis.

Term. Mich. 9. H. 6. fol. 34 & 33. The Visitor, or Sovereign Paramount of the Order, hath power to visit an *Abby*, and those Powers are declar'd to be *General*, *Ordinary* and *Extraordinary*.

And therefore by the Statute 2 H. 5. 1. Visitors are appointed to enquire into the *Governance* and *State* of *Hospitals*, &c. and of *all other Matters* (without restriction of Offences or limitation of time) and to *reform*, and to *correct* them: and in the Case of *Sutton's Hosp.* 10. Rep. p. 5. To visit, is explain'd by, to *order* and *reform* all *Disorders* and *Abuses* in and touching the said Hospital. "*Visitator est fidei Commissarius*, is the *Trustee* and *Representative* of the *Founder*, and hath the same Power in the *Government* and *Preservation* of the College, as the *Founder* himself; and therefore it is evident, that in both *Laws* the *Universal Jurisdiction* of all *Causes* relating to the *State* of the Society, and the *Governance* thereof is of *Right*, and of *necessity* committed to the Visitor.

Now if this Rule holds in the Case of a Visitor in *General*, it is infinitely more strong for him, who is constituted *Ordinary*, or *Ordinary Visitor*; For that Word, as well in Canon, as in Civil Law, (and since, as thence receiv'd) in *Common*, implies and carries with it *original* and *universal Jurisdiction*. An *Ordinary* is distinguish'd as from a *Delegated*; so from a *restrain'd Judge*, he hath within his *Sphere*, and within his *Forum* (whether *Secular*, *Ecclesiastical* or mixt) the *Conusance* of all *Causes*

See *Sidof. p. 21. Widrington's Case, and 8 Aff. Ed. 2.*
P. 1. c. 1. Ordinary. See *Misera Pillao. Antecessor ad Cap. conq. de Officio Jyd. Ord.*
Ordinary ad le Power de Visitation de Mero Jure Dav. Rep. p. 3. See *Mendo de juri Acad.*
Ad Ordinarium spectat universitas Causarum Calv. in v. Ord.

whatsoever, and that of himself, without any *deputation*. And therefore tho the *Nature* of the Causes, and the *procedure* upon them may be different; yet as to the *rise* and *extent* of the Power, the Jurisdiction of all Ordinaries in their respective Courts, must be the *same*, and equally *Universal*.

Now then as the Canon for prevention of Proxies restrains the Bishop, tho Ordinary to triennial Visitations of his *Diocess*; so the Local Statutes for prevention of *Sportulage*, limit Visitors to a *Quinquennial* Visitation of their Colleges: And yet the Canon, and the Statutes that restrain the Solemn Visitation, bar them not in the mean time from the ordinary *Acts of Jurisdiction*. A general and chargable Enquiry *ex Officio mero* into Matters undetected is limited; but a redress of emergent Grievances, and the Conuifance of Matters delated, as necessarily incident to his Office of Ordinary, neither is, nor without an apparent Failure of Justice can be taken away, or restrain'd. And therefore as in all Dioceses, so in all Colleges, where the Right of a triennial or quinquennial Visitation is lodg'd, there in the same Person, this Power of redressing Grievances in the interval, hath always been *presum'd* and *allow'd*. And as the *Practice* in all Colleges hath always been the same, so is the reason of it too: An *Universal Provision* for all Grievances is design'd; the Redress of them is plac'd in the Ordinaries and Visitors only; and therefore their Power doth

Visitatio intramittitur sepius necessitate existente, sigolin p. 103.

Regula que respicit Commune, & regularem visitationem, que fit etiam sine causa, non prohibet iuratum, si causa subesse. Marian. Specin. de Vis. Sec p. 241.

This Fra. de Padris calls Quotidiana Visitatio, que fit quoties ex multis causis emergentibus.
Tr. Tracl. Tom. 14.

and must during the triennial Term extend it self to any occasional Exorbitances. It is further observable, that an Ordinary is said to have an *internal Jurisdiction*, and such an one as is opposite to a foreign Authority; and therefore when Bishops visit their own Hospitals *de Jure*, they act as Ordinaries, but when appointed by the King, they have only a borrow'd, foreign, and delegated Jurisdiction. When Bishops visited their Dioceses, they were *domestick Judges*; but when *tanquam Sedis Apostolicæ delegati*, they visited Monasteries and places exempt; they had only an *extraordinary and derivative Authority*.

This is the Power of a Visitor, which may and ought to be exercis'd in those Places that are of right visitable, and therefore it is next to be remark'd, that not only Churches, but all Free Chappels, all Hospitals and religious Houses, as well of Seculars as Regulars, all Universities and Colleges, all Lay-Confraternities instituted for charitable Designs, and in short, all *Loca pia*, whether they be ecclesiastical, lay, or mixt Societies, are in both Laws, Canon and Common, subject to Visitation. And therefore if no particular Visitor be appointed by the Founder, and no other provision is by Law made for the Visitation, then the Ca-

a Coke 10. Suc. Hosp. 31. Brook Ab. 55. vid. 2. H. V. St. 1. 14 Eliz. c. 5. 13 Eliz. c. 17. Lyndp. 43. f. 10. 14 Eliz. c. 5. 2 Inst. p. 725. Roll's, Ab. f. 229. 8 E. III. 70. 37. Davis Privy 23. 9 H. VI. 31. 9 Ed. IV. 24.

b See Hostiensis de Rel. Dom.

c Offod. l. 5. Tit. 31. c. 1. in fine sui qua. Quarant v. Exempt. Genues. in prax. c. 59. Vid. Ribuff. de contra. Lup. de Xen. Summa Sylvest. in v. Hosp. § 2. n. 3. Rolls. Ab. p. 22. 230.

Vegut. p. 103. Visitatione ab Episcopis que Generalibus Capitulis non sunt subiecta.

Angel. in v. Hospit. Et hoc procedit utiam Testator qui edificavit prohibuisset; ne Episcopus in tali negotio intromitteret. Conc. Trid. Sess. 7. c. quia Testator non potest facere, quin in leges suo Testamento locum habeant.

11 H. IV. c. 31. Ed. III. 5. 6. See Marrad. de Jure Abbatum Prescriptio tollens visitationem non valet, quia cedit in damnum publicum, sed valet que transfert.

non and Statute supply the Omission, and entrust the *Ordinary of the Place* with this universal Jurisdiction. There is no prescription against Proxies, no more than against Tiths; the one is as incident to a Visitation as the other to Instruction; and both those are and have been esteemed of indispensable necessity. Visitation is as incident to those Societies as a *Court* to a *Mannor*, and is equally of common right and of common necessity: And therefore ^b it is, and was a received Rule in both Laws, that of such visitable Places and Persons none can in any place be wholly exempt, but must either be immediately *subject* to one, or *reserv'd* to another Power.

Now there are two *Methods* by which all Grievances and all Exorbitances may be brought into question before the Visitor; one is the Complaint of the Party aggriev'd; the other the *general Enquiry* of the Visitor himself into all the Offences of his Subjects: The former is by the *Prosecution* of the Party, the latter upon the *mere Office* of the *Judge*; the one of these, tending to the Redress of particular and occasional Grievances, gives foundation to an *Appeal*; the other, aiming at the Reformation of all general growing Misdemeanours and Exorbitances, affords Matter for a *Visitation*. Now tho it is certain that all Visitors are entrusted with both these Powers, as equally necessary for the preserving the College, yet is it no less evident, that both these are distinct in their *Nature and End*; and that nothing but gross Ignorance can confound them. Nothing but Complaint made to a supe-

^a *Dav. Rep. Case Proxies.*

^b *Non valet prescriptio ut ab aliquo visitari quis non possit, sed bene valet contra Episcopum quod alius Prelatus visitet.* Cald. Lond. 453.

rior *Judg* by a particular Person, in his own necessary defence for his own private Interest, and which tends not so much to the Punishment of Offenders, as to his own Relief, can produce and occasion a Commission of Appeal. But the Confession of his own Subjects, made upon Oath to a *Judg*, upon his enquiry for the Execution of Justice and which propounds not any private Amends and Satisfaction, but the publick Good, and the Safety of the Body Corporate is the ground of a *Visitation*.

Now then, since I have in short laid down the necessary Powers of a *Visitor* and an *Ordinary*; the usual Methods of their Procedure upon an Appeal, and in a *Visitation*; and lastly have shown the Nature of Places visitable; it remains as briefly to apply these certain and general Rules to the present Case in question.

The Founders of Colleges then as they design the Perpetuity of their Estate, so they equally desire the Continuance of their own Laws and local Statutes. ^a Their Trustees for enforcing these Orders and Constitutions are by Law their *Heirs*; and, by appointment, usually among Bishops, their *Successors*. These are, in respect of their Protection of the College, called *Patrons*; in reference to their Jurisdiction, *Visitors*. For as it is a certain Rule, That a Founder hath in him the Power of *Visitation*, so is it no less controverted, that a ^b Patron, who is *loco Fundatoris*, succeeds to those Rights, and by construction of Law, is *Visitor*. Oftentimes, as is easie to be seen in the Charter of ancient Hospitals and religious Societies; there is nothing more specifid than *Visi-*

^a 6 H VII. 14. Fitz. N. Br. fol. 93. 94.

^b 8 E. III. Ass. 29. & 250.

tatorem relinquimus; and in others, *Patronum designamus*; and those words only by plain and necessary implication convey'd the visitatorial Jurisdiction in its full extent and latitude. The Power of receiving Appeals was so great and so necessary a part of that Authority, that tho I find in very few Statutes of Monasteries and religious Societies, that Liberty expressly given them, yet was it *presum'd*, *own'd* and *practis'd* in all. Whether the *visitatorial* Power was lodg'd in the *Ordinary* of the place, the *Principal* of the Order, the *superior Abbot*, the *Capita Ordinum*, the *Judex Academicus*, the *Conservator Universitatis*, or lastly in the *local Visitor* of the College, it is a certain undeniable Proposition, that wherever the entire Power of *Visitor* is plac'd in one Person, there, as an *incident* to the Office, the Redress of Grievances upon Appeals was by Law vested and settled.

And therefore, tho the pretended Restrictions are as strong in almost all Colleges in the University as in *Exeter*, there is not one, at least of any standing, wherein Appeals have not constantly been made to the *Visitor*. And as Custom and common Practice have own'd the *Visitor's* Authority herein, so likewise the Courts at *Westminster* have countenanc'd and approv'd it. And therefore in *Apleford's Case*, *Mic. 22. Car. B. R.* in *Widrington's Case*, *Hill. 13. and 14. Car. II. B. R.* in *Dr. Lewis's Case*, *Provost of Oriel*. in *Parkinson's Case*, *1^{mo} W. & M. B. R.* in *Prooft's Case*, *Hill. 3^o W. & M. B. R.* it is resolv'd, That the proper Remedy of all expell'd or injur'd Heads Fellows or Members of Colleges, lies in an Appeal to the *local Visitor* only, and that they are conclud-

See *Whitlock's Read, Div. 3. Point 9.*

See *Patrick's Case, Hill. 18, 19, Car. II. B. R.*

ed by this determination. "If there be a Jurisdiction in
 "the *Visitor*, saith my Lord C. J. *Hales*, and he hath de-
 "termin'd the Matter, how will you get over that Sentence?
 "and thereupon a *Mandamus* was deny'd. But if a Fellow
 had no *Visitor* to whom he might appeal, as in *Herns Case*,
 the *Mandamus* was granted and adjudg'd good. Since there-
 fore in all other Societies and Monasteries an Appeal to the *Vi-*
sitor hath been granted, since in all Colleges it hath been us'd
 and allow'd, and since as in all foreign Courts, so especially in
 those of *Westminster* it hath been unquestionably admitted, no-
 thing needs further to be added to the Confirmation of it, than
 that in *Exet. Coll.* the Statutes do more plainly cast that Power
 upon the *Visitor*, than in most other Colleges of the University.

The Statute *De Visu.* says, *Adeo primum & ad malum pro-*
clive est humanum genus, & uti quotidie videmus, varietas tem-
porum optima quæque aufert, & mutat, ut non sit in nostrâ po-
testate eas condere Leges & Statuta quæ non violet aliquan-
do astutus, & versipellis, aut malè interpretando aut aliquid
fraudis ingerendo aut excogitando modum quo nodum quamvis
Herculeum dissolvat.

Distinctions, he was sensible, were to be found out; the
 Statute might easily be eluded; *Bribery* might be construed
Repairs; *Promotionis causa* might be interpreted a *Benefice*,
 and therefore against all these Evils he provides a *Visitor*, un-
 happily not foreseeing, that even this Remedy it self might
 malè interpretando be distinguish'd into nothing.

Nos eam ob causam, ea quæ duximus nostro tempore utilia &
commoda, inferentes quòd ea conservanda rectèque interpretanda
attinet, confidimus authoritati & benignitati Episcoporum Exoni-
ensium Successorum nostrorum, quos dicti Coll. Patronos & Visi-
tatores

tatores relinquimus, ut illi qui ex sua liberalitate & mera benignitate adducti ac fervidâ charitate in fidem Christianam inflammati, ad hoc Alvearium conservandum invigilent, ut Statuta & Ordinationes dicti Collegii firmiter observentur, virtutes & disciplina nutriantur possessiones & bona spiritualia & temporalia prospero statu floreant, jura, libertates & privilegia defendantur & protegantur.

Now I would willingly know, whether relinquimus Patronos, & Visitatores, be operative Words or not; whether confidimus autoritati & benignitati Episcoporum Exoniensium ut ad hoc Alvearium conservandum invigilent ut Statuta & Ordinationes dicti Collegii firmiter observentur, &c. are fit for an universal provision; and do consequently lodge in the Visitors thereof an *Universal Jurisdiction*? whether it is possible to defend Possessiones & bona spiritualia & temporalia by a Visitation once in *Five Years*, which may be dilapidated in less than *one*; whether it will be easie *protegere jura & Libertates* of the Members thereof, by restoring them *Five Years* after Expulsion? Could there be more expressive, plain and extensive Words found out for the Settlement of the Visitatorial Power? and can it afterwards be thought that the Founder design'd to expose his College and the Members thereof to all growing Evils, to all occasional Grievances, and emergent Exorbitances and Combinations?

It is plain then that the Founder repos'd the whole Trust and Care of the College in the B. of Exeter his Successor; and to that end constituted him *Ordinary Visitor*, and *Patron* thereof, in so general and expressive Words, that in all the Appointments of the *Visitors*, either of Hospitals or of Monasteries, or of Colleges; I never saw, and believe there is not, any one Instance wherein larger Powers were granted to a Man, and where-

where the Grant was ever made with more Solemnity: And therefore, if this Power (which is an impossible Supposal); but if it should fail in its bottom, I dare, upon enquiry, affirm, that no *visitatorial Jurisdiction* of Churches, Hospitals and Chappels, can upon more exp̄ressive Words be maintain'd and supported, and that all the provisory Constitutions of those Societies were vain and idle Appointments. For if Founders do adjure, and in *Visceribus Jesu Christi* beseech their Successors; *ut fervidâ Charitate in fidem Christianam inflammati*, they should expell all Heresie from their Society; and if afterwards their Saviour in this very College should be expos'd as a *Galilean Vagabond*, and a *Crucifid Vagabond*, and if all the Fundamentals and Articles of Faith should be therein ridicul'd to the known disturbance and abhorrence of the whole University in a most solemn manner declar'd; and if, lastly, it is impossible for the sole Visitor of that College to give any redress herein, or to allow any less scope to the Rector for Libelling his Saviour here then a *Quinquennium*; then it must be allow'd, I suppose, that these Rules and Orders were inconsistent and null, and the well meant Dreams of their *Religious Founders*; But if an Universality of Jurisdiction, as plainly it is, be lodg'd in the Bishop, and may upon such Emergencies be exerted, then is the Founder consistent with himself, then his plain Words will have their due Force; And the College according to his appointment may be govern'd and preserv'd.

I shall insist now on no more than one other Branch of the Statute. *Quos quidem Rectorem Subrectorem, & Electos, ac præterea Ministros quoscunq; & Famulos, prædicto Domino*

mino Episcopo, & suo Commissario, sed nulli ali, volumus & precipimus effectualiter intendere & parere.

As before, the Bishop was appointed Visitor; so here all others are barr'd from any Partnership in the Authority: The Powers that were given him are intire, and undivided; and all the Controversies are taken away, that usually arise from concurrent and interfering Jurisdictions.

Now since by express Words so large Authority is plainly lodg'd in the Bishop of Exeter; let us consider what is offer'd to divest him of this Power.

1. A Fellow hath sworn not to commence a Suit against the College, and hath renounc'd the Right of Appealing.

Omni Actioni contra Rectorem, &c. quomodolibet appellationi & querele in ea parte faciendis & quarumcunq; literarum impetrationi, precibus principum, praelatorum, &c. quibus possem ad jus, titulum & possessionem vendicandam reconciliari, ac quibuslibet juris vel facti remediis, per quæ me petere possem in integrum restitui, quantumcunq; aliàs mihi probitatis & vite merita suffragantur in vim pacti renuncio.

Now if in this Oath it should be admitted that the general Words should include the Visitor, as they plainly do not; yet nevertheless how can any Judge be sworn out of his Authority by a Fellow? If he had not Power of receiving Appeals before, The Oath under this Interpretation would be vain; and if he had, the Oath, in regard of the Visitor would be void and ineffectual. If all the Tenants of a Mannor should swear not to attend the Court, the Oath would not only be illegal in respect of the Tenants, but vain in reference to the Lord.

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The Oath is not design'd to take away *Jurisdiction* from the Judge; but to take away some *Liberty* from the Fellow; If Men should upon Oath submit to Referees or Arbitrators, the Power of the Courts would not be diminish'd, but the Right of the Subjects restrain'd; for it is a vain and senseless conceit, that if my Authority, of what Nature soever, whether from King or Subject be legally vested in me, any Man by *his* Oath can swear away my *Jurisdiction*.

2. This Opinion as absurd as it now seems, is more so, if as really, there is not, are there be no such Oath at all: A Fellow renounces indeed Appeals in General, and those Words of Latitude are put into a certain and determinate Signification.

Now the *Visitor* cannot come under those Words, however large and extensive; the *Visitor* hath a domestick and internal *Forum*; and whereas a Complaint to him is an application to an *ordinary* Judge; An Appeal in propriety of Speech is a recourse to a *foreign* or *superior* and *extraordinary* Jurisdiction: In all Abbies, and in all Colleges, in all Instances of Canon and Common Law, these general Words excluded any other Authority, except that of the *Visitor*; but did secure and strengthen his Jurisdiction. And therefore when the Statutes of *Exeter* College were made, the Founders well knew the Power of the *Visitor* as settled by Law; they knew the Practice of all Colleges, from whence these Statutes were transcrib'd; and therefore if they had design'd to put any *new* Limitations to the *Visitors* Authority; it is impossible to think but they would have found out *new* Words to express their Intention.

Then

These Statutes, however ancient the College is, are of a late date ; the Usage of all other Colleges was then known and fixt, and therefore if any more than the customary Renunciation had been design'd, the usual Oath would never have been borrow'd and impos'd. All Letters of great Men are renounc'd ; all forreign and vexatious Suits are forbidden, and would it not have been as easie (since he descended to particulars) to bestow one word upon the *Visitor*, and at least by Name to exclude him ? The Absurdity of that Opinion, if it needs be further demonstrated, appears most visibly in this following Instance: The *Rector* is by Oath barr'd as much from all these *juris & facti remediis per quæ possit in integrum restitui*, and renounces them in *vim pacti*, as well as the Fellows ; and yet in the Statute he is expressly allow'd to appeal to the *Visitor*. Now would a *Founder* give a Man a Liberty by Statute, which he takes away by Oath ? Would he settle a Right in the *Rector* in one Statute, and oblige him to swear himself out of it in another ? It is clear then, that the *Visitor* was not within the purview of that Oath, and that the *Rector* would have been guilty of no *Perjury* for appealing to him. But I leave it to his *Polonian Casuists* to distinguish him out of it upon his farther Appeal.

If then the *Visitor* hath general Powers vested in him by Law and by Statute ; if he is the *Conservator* of the College ; and as in their *Acts* he is formerly call'd *Patronus*, and *Supremus Judex* therein ; if he can redress all Grievances, and hath consequently the Power of Receiving Appeals ; it is not possible that a *Fellow's* Oath, tho' it should have particularly nam'd him, can devest him of that Authority;

thority; and if such Oath doth *not* particularly name him, nor by Comparison with other Statutes, was intended to exclude his Jurisdiction, it is certain that the Authority remains *entire*; and, that in the same manner as Appeals lay to him before the Oath, they must be admitted to lie after it.

2. The second Exception to this Universal Authority is drawn from the Words of the Statute *de Vis*.

Eâ de Causâ liceat Domino Episcopo Exon, qui pro tempore fuerit, & nulli alii, nec aliis, quoties per Rectorem dicti Coll. & in ejus absentia Subrectorem, & quatuor alios ad minus, ex septem maxime Senioribus Scholaribus fuerit requisitus; Nec non absque requisitione ulla de quinquennio in quinquennium semel ad dictum Coll. per se, vel per suum Commissarium, quem duxerit, deputandum libere accedere. Cui quidem Reverend. Patri, ac Deputato suo (præterea nemini) tanquam Patrono & Ordinario Visitatori, vigore præsentis statuti plenam concedimus potestatem, ut super omnibus & singulis particulis & articulis, in dictis Statutis contentis, ac de quibuscunque aliis Articulis statum, commodum, aut honorem dicti Coll. concernentibus aut que in dicto Coll. aut aliqua illius Persona fuerint reformanda, aut corrigenda, Rectorem, Scholares, & Electos interroget, & inquiret, cogatque eorum unumquemque in Virtute Juramenti, & per censuras si opus fuerit ad dicendum veritatem de præmissis omnibus singulis, &c.

It hath been before prov'd, that two Powers are necessarily lodg'd in a Visitour; one is the ordinary jurisdiction, which exerts it self upon the injury and complaint of any of his Subjects; and redresses their grievances: The other is an extraordinary and general enquiry made by the Judge
himself

himself *ex officio* without the instance of the Party. Now this Statute doth not only vest him by the former general words with the *ordinary* powers necessarily incident to a Visitor's Office : But goes on likewise to *ascertain* here his *extraordinary* Authority and to fix the *bounds* of it. This *Visitation* is general as well in respect of *Crimes* as *Persons* within the Judges territory and compass ; and is sometimes *necessary* and therefore *not omitted* ; but withal troublesome and *chargeable*, and therefore *restrain'd*. In this general enquiry *by Office* which is by the Canonists call'd *Officium merum* the powers of the Judge are much larger than upon an *Appeal* ; the method of the procedure different, and the occasion of it are of as great, yet usually not of so urgent and pressing necessity. And therefore since his Powers are *great* ; the solemnity of the Process extraordinary ; and the *Sportulage* which is always incident to it, not small ; it was prudence in the Founder to allow the use of *ordinary Jurisdiction* *always* ; and by that means to prevent the necessity, as well as to restrain the exercise of his *extraordinary Authority*. And herein the care of the Founder was agreeable to that of the Church, for no *Canons* ever set bounds to any other than gainful Visitations, nor ever thought fit to limit the Duty, but where it was recommended by Proxies.

As this Jurisdiction then is set up by Statute ; so another, in Case of great emergencies is likewise plac'd in the Visitor ; which is a *Visitation upon requisition*. This is a mixt Office ; and differs from a Visitation because it is granted upon *denuciation* and *presentment*, and upon the instance of the party ; and yet at the same time agrees not with Appeal ; because it proceeds by Enquiry and tends not to the *redress* of a

private grievance, but the regulation of some publick enormity.

This Branch of the Statute therefore, however it may limit a *Visitation*, is so far from restraining *Appeals*, that it enforces them; for where-ever the extraordinary Remedies are limited, there is more occasion for, and more Latitude to be given to, the *Ordinary Jurisdiction*. This is the plain and natural intendment of the Statute; this is that *Universal Provision* which the Founder design'd, which the College need, and which the *Visitatorial Power* was brought in to supply. Upon this short view of the Office of *Visitor* in general, and upon this enquiry into the Statutes of *Exeter College*, in particular, it may be safely affirm'd.

1. That all sole Visitors separately, and all Visitors ordinary, and extraordinary joynly, have as an incident to their Office, the Power of receiving Appeals.
2. That this Power, as in all Churches, Monasteries and Hospitals, so in all Colleges both by the respective Visitors thereof, been us'd and exercis'd, and in all Courts been confirm'd and allow'd.
3. That the Local Statutes of *Exeter College* do in the same, and no other manner, then as the Canons and as the Statutes of most other Colleges, limit and restrain the solemn, extraordinary, and chargeable Visitations; but at the same time do vest the Visitor of the College, with all ordinary Jurisdiction in its full extent and latitude.
4. That the Statutes of *Exeter College* are so far from precluding Appeals to the Visitor, that they expressly warrant them, and that the Oaths of the Rector and Fellows
neither

neither can, nor by the plain and natural sense of the Words, are intended to restrain this Authority.

If then the *Visitor* hath power of receiving Appeals, *Dr. Masters* Commission is good, *Dr. Bury* rightly as well as justly expell'd, and the whole *Process* legal and unquestionable. * It is not necessary therefore to add what yet hath been apparently prov'd, and will more fully be clear'd, that if the Bishop had no Power of receiving Appeals, and consequently the Commission was void, and the Acts of it null and inauthoritative, yet however the *Visitation* could not thereby be barr'd, nor the Bishops Right be taken away, nor the Expulsion defeated.

The Point being thus settled, it will be an easier Matter to consider those little Objections, which have been started by the Author of the *Case*, and have not yet been refuted by *Mr. Colmer*. Some things there are in the *Account*, which he says he does not *understand*, and perhaps it may be no easie Matter for me to bring down my Expressions to his *Understanding*; or his *Understanding* up to them: Other Passages there are that in his Opinion need no Answer, and they therefore stand in the same Condition they were, and want no Defence: But as to the Exceptions taken, they shall have Answers that are very short; and yet as I suppose, full, and no otherwise tedious, then because superfluous and unnecessary.

After the History of *Mr. Colmers* Incontinence, which has been prov'd to be False and Immaterial; the first Proposition laid down is, That an Appeal to the *Visitor* is by

* See the *Account of the Proceedings*, &c. P. 26, 27.

Oaths restrain'd; and then he gives you a Comment on the reasons of that Restraint.

For when he hath put strange Orders on the Founder, which he never made: then he gives the Grounds, which induc'd the Founder to the making of those Orders.

The Ground then, that is reasonably supposed to perswade him to this *Policy*, was the Peace and Quiet of the House: And,

Were not all other *Societies* of *Students* as much design'd for Peace and Quietness as *Exeter College*? Had not *Monasteries* Free-Chappels, and Religious Societies as little occasion for Disturbances and Quarrels as Colleges? And were not their Founders weak Men to bring them into Noise, Feuds and Dissensions, when they appointed a Visitour, and gave him due Power of redressing their Grievances, and of deciding their Controversies? Would there not be much more Peace in a Diocess, if the Clergy were not subject to Visitation? And if a Parson, whose Study and Profession entitle him to Quiet, might not be cited from his Home, and subjected to the Complaint of every vexatious Person only for *Herefie*, *Bribery*, and *Incontinency*? What Confusion and Disturbances the Statute of *Hen. 5.* occasioned in *England*, when it subjected Hospitals to Visitation, whose Members before, were *without any noise* robb'd and despoil'd, and whose Revenues had been very quietly lost, and dilapidated? In short, the taking away of *Westminster-Hall* would be an effective Remedy against *Champerty* and *Maintenance*, and troublesome Law-Suits and Contention would quickly cease, if we would remove the Courts, in which they are to be ended.

But

But now for once I would desire him to make as many *reasonable Supposals*, as he will for the late Rector, and such Fellows of *Exeter College* as imploy'd him; but as few as possible for the Founders, who neither need nor desire his assistance. The Founders were Wise-Men, *Stapuldon* was a learned Bishop: Sir *William Petre* a prudent Statesman, and therefore such *reasonable Supposals*, tho of a Piece with the rest of the Book, are ill suited to the Character of the *Persons introduc'd*. All the Peace and Quiet which the College can aim at, or hope for, is promoted by the Office of a *Visitor*, and their particular Happiness consists in having their Controversies decided in a *private and domestic Court*. And tho the Censures of a *Visitor* may be troublesome to those Persons that deserve them; and a review of the Cause try'd is not very acceptable to some Judges; yet certain it is, that nothing is more requisite than the *Visitatorial Power*, for the due government of the *Society*, for the prevention of Grievances, and Exorbitances; for the speedy determination of Controversies; and for the settlement of Peace and Quietness in the College. Especially since, if there be no *Visitor* that can give redress to a Fellow unjustly expell'd; It is plain that a *Mandamus* would lie for him, as well as for a *Parish Clark*; and that this admirable Method of *producing Peace and Quiet*, would draw the Cause from the *Visitor* into *Westminster-Hall*.

The next thing that he leaves me to explain, is an Oath, being accessory to a Statute: Where-ever an Oath is relative to the Law, and the Sense of one depends on the meaning of the other, and the Obligation of one, relies on the continuance of the other, here it is accessory to it.

Now

Now then, *Si continget me per Rectorem aut in hujusmodi interesse habentes corrigi, puniri, aut à dicti Coll. sustentatione ejici & expelli, excludi, privari vel amoveri propter mea forsan demerita, ipsum Rectorem, seu alias Personas, seu eorum aliquem, &c. quantumcunq, alias mihi probitatis & vite merita suffragentur.*

In this Case therefore the *demerita* are (as is elsewhere explain'd) *Causæ in Statutis contentæ*: The *interesse habentes* are such as are appointed by Statute; and since it is impossible to know the extent of the Oath without recourse to the Statute: The Oath is accessory to it, and guided by it.

And if the Statutes are alter'd by legal Authority: The matter of the Oath is likewise chang'd, not the obligation; and the Oath, as strongly obliges to the performance of the new Law, as once of the old.

2. He proves that *legitimè convictus* doth not mean a conviction according to the Law of England. For it is plain to him that the Rector of the College cannot impanel a Jury; nor administer an Oath. This is the *Phantom* that he raises; and, being his own, it is easily refuted even by himself: For no Man else was so absurd as to imagine, That when the Founder had in every thing else pursued the Terms and Rules of Canon Law, he would have borrowed the proof only of a charge from the Common: But if *legitima convictio* doth not amount to a conviction by a Jury; must it mean nothing, or must it signify a conviction *without*, or *against* Law? for if it doth not, it will not justify Mr. Colmer's Expulsion.

Legitima convictio is such a conviction as the Statutes direct; and where the Statutes are silent, is such a conviction, as the Law

Law

Law require, in conformity to which these Statutes are made. The method of the Conviction in divers Laws is very often different; but it is always grounded on a *crime*, and no crime can be applied to a person but by proof. In common Law a Verdict is founded upon evidence; and is presumed to be made in pursuance of it; In Canon law, where Trials are made by Witnesses, not by Jury, nothing but the confession of the Parties, the Testimony of two witnesses, or the *Notoriety of the Fact* can make a *Conviction*. And therefore as in one the Sentence of a Judge cannot convict any man, when supported by no verdict; so in the other it is equally void, when founded on no evidence. A man cannot renounce his Right to legal Proceedings; If he should agree to be sentenced uncited and unheard, and to be convicted without proofs; it is a void Agreement, and so utterly null and illegal, that the *vis pacti* cannot support it: *Sententia nulla potest partium consensu ut valeat, non tanquam sententia sed tanquam contractus*: Cald. Cons. 138.

The Fellows of Exeter might be convicted of Incontinence, as the Statutes of other Colleges direct *per idoneos testes, & facti evidentiam*; or as Clerks are to be convicted of it, according to such lawful proofs as are requisite by the law of the Church: 1 H. 7. c. 4. The Rector, if he cannot administer an Oath, might have used the assistance of the Vice-Chancellors or of the Visitors Jurisdiction. Homicide is in the Ecclesiastical Court a cause of Deprivation; and yet it cannot originally be examined there: Their Sentence must be built on a Conviction at Common law: and as the Spiritual Judges even to Ecclesiastical purposes cannot convict Men of such crime by Ecclesiastical Proofs; so much less can they declare men convicted without any. Hob. 122. Scars Case. Cr. 2. Hob. 194. A competent Judge then is not more required, than Legal Testimonie; *Summarie de plano & extra strepitum Judicalem* may take away the formality of the Process, but never the necessity of Evidence; The noise of an Oath is not great; nor the length of it tedious; It is the direct and plain way of Procedure; and all Presumptions, strained Inferences, and traditional Reports occasion the length and circuit of a Trial.

Legitime is expounded in the Probationers Oath *Secundum exigentiam Statutorum*, and so *Canonice* is interpreted *Secundum*

aut exigentium Canonum. Lindw. 5. Tit. de Purg. Canon.

3. Si propter mea demerita contingat me deprivari is in some statutes of other Colleges explained propter mea demerita, aut causas in statutis contentas, in others propter malos mores, aut mea demerita. Now this Gentleman's interpretation of ob mea demerita is whether a man be guilty or no, which then should have been thus expressed ob mea forsan non demerita. And if non added to this and most of his affirmations, it would much ease the Book of many falsehoods, and make it in many other instances, true sence, as in this good Grammar: But the following words put the sence of it out of doubt, *quamvis alias mihi probitatis & vite merita suffragentur*: Which imply a Man criminal in this, and irrepoveable in all other concerns. The Oath was designed to oblige the Conscience; if the Crime was true, Acquiescence was enjoyed; if it was false, no just remedy was precluded. And whether the charge were true or false, his Conscience is judge; and his Oath enforces the Conscience to a right judgment.

If then an innocent man had liberty of Appeal, whoever doth not appeal confesses, and owns his guilt. *Non appellans dicitur ap- probare sententiam latam Card. Tusc. can. 388.*

5. My 4th. reason was this. "That it is the plain design of this Oath to secure the College from any *Action at Law*, or any other disturbance *from abroad*; and that in the recital of the different appeals, and remedies, which are there prohibited, that of *appeal to the Visitor*, which was most obvious to be thought on, is not *expressly* mentioned nor forbidden: And therefore that those general words may in an equitable sence be intended to restrain the Party from all Appeals to an *Extraneous*, not to a *Domestic* Court; to one that is a *Foreign* Judge, not to a *Visitor*, who is a *part* and the *first member* of the College.

Nothing in the answer deserves to be considered; but the domestic Jurisdiction of a *Visitor*; if the *Founder* referred all *jurgia ira & rixa* to the final arbitration of the *Rector*, *Subrector* and three *Seniors*; The Jurisdiction of those persons thereby gained in respect of the *Visitor* was *cumulative*, not *privative*. And therefore when

a man is forbidden, as in this case, to prosecute another *coram aliquo Judice extrinseco Ecclesiastico vel Seculari*; the intent of the *Founder* plainly appears to bar any action in the *spiritual* and *temporal* Court; and to refer the contending Parties to the Arbitrators there mentioned or at farthest to no other than some *intrinseck Judge*. And it is observable that these little Controversies were not to be *Judicially* ended by these Persons; but *aliquâ ordinatione bonâ & concordia per personas prædictas* (as *Referees* and *Arbitrators*,) *terminentur & fiantur*: so that here an amicable reference is advised and enjoined; but still upon a farther disagreement, if it could not take effect every Action *coram aliquo Judice extrinseco* was expressly forbidden, but not a recourse to a *Visitor* disallowed.

The Argument concerning *John a Stiles*, and the *6th. Commandment* needs no grave answer; and I have at present neither will nor leisure to expose it.

6. Arbitrary power is power against law: And the unstatutable Expulsion of a Fellow; and the denial of a lawfull Appeal are illegal and arbitrary Acts: what obligations the *Founder* might have enjoined we dispute not; but we have proved, that none are laid: The *Visitors* Authority is not created by the local Statutes, but cast upon him by law; The Power of a *Visitor* depends not on the *Founder*, but the Right of the Bishop of *Exeter* to that power is derived from him: The Kings Courts have a more *large* Jurisdiction than the *Visitor*; but not more *certain*. And therefore no mans Oath can bar the Power of the one, nor of the other; especially since it appears, that it was not designed to preclude them.

Thus hath it once more been proved; That the Oath is necessary to the Statute, that no innocent Man is barr'd from *Appeal*; that legal Proofs are necessary to a legal Conviction, that the *Visitor* is a *Domestick Judge*, and that *appeals* to him from an innocent person, illegally expelled, are not more warranted by Reason, than by Statute.

Next, the *Case* examines the reasons that proved the *Visitors* Authority of receiving *Appeals*.

P. 36. It is owned, That there are no other Judges of *Appeal* except the *Visitor*; but it is doubted whether there are any Judges of them at all. An *Appeal* is a natural Defence which cannot

be taken away by any Prince or Power ; much less by any other than by the supreme Magistrate and not justly by him. And therefore it is not easy to conceive, especially if we read his words, that a *private Founder* ever designed to preclude it. For since *Appellationes remotæ* is never mentioned in the Statutes but once, and since then it expressly bars an *Appeal from the Visitor* not to him ; no part of the Statutes can be urged against the *Visitors* authority, but the Oath of the Fellows. That Oath hath been already proved to bar no *Appeal* to the *Visitor* ; and the rather is not capable of that sense ; because all Statutes that take away *Appeals* are *odiosa*, and therefore in doubtful cases are limited and restrained ; and all renunciations of right must and ought to be construed in *favorem renunciantis*.

If then a *Visitor* had power of receiving *Appeals*, if in this College all other *Judges* but the Bishop of *Exeter* are expressly excluded ; if the Oath doth not take away the Fellow's right, much less the Bishops Jurisdiction ; then it follows, that the Bishop had a Right of receiving *Appeals* ; incident to the Office of a *Visitor*, and yet distinct from his Right of a *General Visitation*.

2. " To dream of universality of Jurisdiction from a sound of " a word *Ordinarius* is a conceit that needs no more refutation ; " than the mentioning of it. And to dream of the visitation in five years from the sound of the word *Quinquennium* is equally as senseless, and ridiculous. The import and meaning of both words is fixt and known, and the one is not, as I think more *sounding* than the other. The only difference is, that the latter by chance fell within his reach, and the former is undoubtedly above it. Usually legal Controversies depend on the doubtful meaning of Terms ; The case is altered by the extent, or restriction of a word : and therefore it was *once* a frequent observation in the Law books ; That the true knowledge of terms is the most necessary and most difficult part of that Study. What *ordinarius* signifies ; I have before explained, and any judicious man, that reads those great and express authorities will, choose rather to *dream* with those Authors than to *think* with this Gentleman.

3. The little Objections that follow are already anticipated and

prevented; only one thing I must observe, that the *operative* and *effective* words of the Statute are here stiled the Preamble of it: the Statute it self, as before printed and explained, sufficiently shows the weakness of the Assertion; and all the long Harangue founded on that bottom, is a gross continued mistake, made acceptable however to some Palates, by much scurrility, and no wit.

Men that have no Reputation themselves, may fall upon their Betters without danger; and the return of the Compliment is as prejudicial to the Person affronted, as the abuse it self, because it implies an equality. Libels that have shewn the Malice, have sometimes recommended the Wit of the Adversary; but blunt downright Rudeness is always the joynr product of ill nature and stupidity: however it is not improper that the late *Rectors* Cause should be defended with the *same* decency, with which it was managed, and that the Advocate should at once shew himself Master as well of the Sence as of the good Breeding of his Client.

The Appointment of the *Founder* created him *Visitor*, but the Law ascertain'd and fix'd the Rights of his Office. A *College* and an *Hospital* is as much *visitable* in Law as a *Church*. And the same right that of necessity belongs to the *Visitor* of a *Diocese*, must of Law belong to the *Visitor* of a *College*: The Precincts may be more narrow, but the Jurisdiction is as large; the Subjects may be fewer, but the Powers are as many. The *Ordinary* Acts of Visitation therefore remain equally in both, since (as hath been already prov'd,) the Bounds that are set, reach only to the *extraordinary* Acts of their Power, and their solemn Visitations.

It being evident then that both these Powers, both of *receiving Appeals*, and of a *General Visitation*, tho they are both equally lodg'd in the *Visitor*, yet are both *entire* and *distinct* from each other in their nature; it will be easie to prove that the *exercise* of one cannot bar the Bishop from the *right* to the other: This task is still the less difficult, because the reasons in the Account for it are such, as the *Case* hath not yet pretended to answer.

1. The Bishop of *Exeter* then hath no power but as *Visitor*, but other Powers belong to the *Visitor* than that of a *Visitation*: A distinct Authority of a *general enquiry* is given to him, and if a *Commission of Appeal* amounts not to this Power, it cannot determine it. An *Appeal* is private in its end, and restrain'd in its extent: A *Visitation* is

is of a publick nature, and general in its designs as well as powers : Both indeed may in their own nature be Criminal, but the one is prosecuted *Civiliter*, the other *Criminaliter* ; the one tends to the redress of a Grievance, the other to the punishment of a Crime. 'Tis said indeed in the Case, that *omne majus continet in se minus* ; and that if it makes out any thing, must prove, that whoever hath right of Visitation, hath power of receiving Appeals. But such a Maxim as *Omne minus continet in se majus* , can only convince us, that a Commission of Appeal contains a Visitation.

2. The Commission by which Dr. Master acted, was founded on that part of the Statute, by which the Bishop is appointed and constituted Visitor in General ; not that which gives him power of a Quinquennial Visitation. He has no other claim to this Authority, then as Visitor ; and therefore in his Commission, he sets forth his own Title, and withal the ground of his Power. If any redundant words were there, they could do no harm, and therefore are weakly excepted against. But as it happens, those only are used, that are sufficient to support the delegated Jurisdiction.

3. The Nature of a Commission appears not from the *Stile* or Title of the Judge, but from the extent or restraint of the Powers that are granted. The being of a Court can be no other than such as is warranted by a Commission on which it depends : This was wholly restrained to the Cause of Appeal, and the Commissary exactly observ'd the restrictions. In a Visitation, all the Fellows must necessarily have been cited, and appeared ; but none were call'd to this Court, but those that had been partakers of the Personal wrong, and were oblig'd to answer the charge of Mr. Colmar against them.

4. The Definition of a Visitation then is weakly applied to the Commission of Appeal ; the nature of Visitation hath been prov'd to be a voluntary enquiry into matters Criminal, and Correction thereupon, and to be general likewise, both as to Crimes and Persons. Now how was this a voluntary enquiry, that was made not by the Judge himself *ex Officio* , but at the instance of Mr. Colmar ? How was it general, that took Conusance only of this Crime, and of no other Persons than of such as were concern'd in it ?

Nor lastly, can it be properly said to be an Enquiry into matters Criminal, which only examined a Crime upon the instance
of

of a Party, in order to his *private* amends and satisfaction. Since therefore the Commission was *Special*, and restrain'd *ad negotium appellationis* only, since the *Acta Curie*, which are here annex'd, were in pursuance of that Authority, and exceeded not those restrictions: Since the right of *receiving Appeals* is wholly different from that of a *Visitation*, the Powers much *less*, the Extent and Process more *confined*; it is impossible that this Act can amount to a *Visitation*, or that the *exercise* of *one* Authority, can determine the Bishops *right* to the *other*.

The ground I believe of this *Authors* mistake was this, that wherever a Person hath any right of doing any Act, Act of the same nature shall without the special Declaration of the Party, by intendment of Law, in his favour, be presum'd to be Authoritative and Legal. This Rule, as it holds not in this Case, because *both* Powers were lodg'd in the *Visitor*, so neither, upon the *supposed* failure of *one* of those Jurisdictions, could it reach it: For those Acts must be of the *same* nature, and from the near *affinity* between them and the *equality* of the extent, one is said to amount to the other. Besides that Rule takes in only those Acts which are *undetermin'd* by the Party, and therefore liable to the construction of Law: Whereever Words are *plain* and *express*, there is no room for *implication*, and an intendment may be presumed *without* the Declaration of the Parties, but not *against* it. 1 Just. 245. c. 1. Instit. 49. b. Perk. fol. 55 and 56. 40. Ed. 3. 5. *Intentio mea nomen imponit operi meo*. Hob. Pitts v. James p. 123. Now in this Case therefore, not only the *Commission* shew'd the special intent of the Party; but the *Commissary* himself openly declar'd, That he did not then come upon a *Visitation*, and therefore *resolv'd* the *Sportulage* in that case appointed by the *Founder*. Intendments therefore and Implications are at an end, and the *Commission* it self, if it should be void, would have been a *null* and *inauthoritative* act, and not a *Visitation*.

The main point being thus settled, I shall further examine what is *material* in the *Case*, thinking it more worth while to *refute* the *Arguments*, than, as I easily might, to *expose* the *Author*. All that is afterwards Considerable, falls under these Heads.

1. That by Censures in the Statute, *Ecclesiastical* Censures are not meant.

2. That

2. That the Right Reverend the Visitor, for inflicting of Ecclesiastical Censures, is guilty of a *Premunire*.

3. That Dr. *Herr*'s Place was not void by Statute.

4. That the Visitor had no Power by Statute of suspending the Fellows *ab Officio*.

5. That the Visitor ought not to have been Judge in his own Cause, nor to have pronounc'd for his own Jurisdiction.

6. That the Concurrence of the Fellows to the Rectors Expulsion was not Statutable. And

Lastly, That *Contumacy* is no Statutable cause of Expulsion; and if it were, ought in the case of the Fellows as well as the Rector to receive the same Punishment from the Visitor.

1. As to the Censures.

The Statute says, *Visitator cogat eorum unumquemque in virtute juramenti & per Censuras si opus fuerit ad dicendam veritatem de premissis*. As for *Censura* then this Author turn'd his Dictionary, and found that sometimes it signified a *reprehension*. As tho any term used in Law had not a primitive sense and meaning, and was not afterwards as all words of Art in their respective profession limited and restrained only to the *borrowed Signification*. Any Man that knows the constant custom of enforcing Men to testify the truth *per juramentum & censuras* the usual *Compulsories* in all Ecclesiastical Courts, will smile at any other interpretation. See *Reg. br. orig. fol. 36. b. tit. Prob. Card. Tuf. Con. 189. Scard. fol. 450*. That I may not trouble the Reader with Instances, I will only observe, that in Acts of Parliament frequently, and in rules of Canon Law always, and in Statutes of Colledges, which were made in pursuance of the Canons, constantly, *Censures* do and must mean no more than the Three famous and well known Ecclesiastical Censures. And I refer this Rule more particularly to this Gentleman's Interpretation, *Judex Accademiarum solet ferre censuras etiam in Laicos studiosos, & in causis temporalibus, unde studiorum gratia non est prohibitum Judici Academie, ut sua etiam Jurisdictione Ecclesiastica utatur, quò efficacius secularem exerceat? Mendo de jure Acad. p. 252*. What do Censures mean there, a Rebuke, or a Reprehension, or a Sentence in the Star chamber? or have they a relation to the old Roman Censures? If this be design'd for Wit, it is not very agreeable; but if it be Ignorance, as I suppose, it is extremely gross.

Bonaetia Tom. 1. *Disp.* 2. de *Excom.* talks of *Censura quibus superiores* (speaking of *Visitors*) *precipiunt sibi aliquid revelari. Davila de Cens. Eccl. C. 3. D. 1. Visitatores bene possunt relinquere Ordinationes in scriptis cum pena Excommunicationis; and so Visitatores Religionum* (of all religious Houses) *possunt relinquere Ordinationes in scriptis cum pena Excommunicationis.*

How far therefore the *Founder* could vest the *Visitor* with this Authority, and how far the Law will warrant it, is matter of another dispute: But that *Visitors* have in like Cases used *Ecclesiastical Censures*, even in Societies not merely *Ecclesiastical* and that the *Founder* design'd by these Words to give that Power, and esteem'd it necessary for the *Visitor*, is and will be prov'd beyond Contradiction.

2. As to the *Premunire*. If this Authour had given the Reason upon which the learned Judges granted a *Prohibition* in his Case, the force of their Argument and the Authority of the Persons would justly have commanded an entire Submission and Acquiescence; at least nothing further would have been mov'd than that upon the Prayer of a *Consultation*, their Lordships would be pleas'd, according to their Wisdom, finally to settle and determine the Cause. But now, since he hath been pleas'd to impose his own Opinions upon the World, and with equal Insolence and Ignorance to pass Sentence upon the Bishop himself, and to pronounce him guilty of a *Premunire*: it is not to be expected, that the deference should be paid to his weak *Argument*, which undoubtedly would have been due to his *Report*. The Discourse that he there gives is well proportion'd to the Capacity and the Breeding of his Client; and if the Cause be good in it self, it is there put in so ill a Light, and justify'd upon so mistaken Grounds, that a bad one could not have a worse Face, nor be more weakly defended. Since therefore the Exceptions are so ill taken, and withal so perplex'd and confus'd, it will be necessary briefly to state the Case itself; not with Design at present to settle the Point, but to shew the Weakness of the Authour.

The *Visitor* pronounced the Sentence by the Advice of the most eminent *Civilians* of this Nation; and the Arguments which possibly induced him and them to that Opinion were, as I conceive, such as these.

F

I. Probably

I. Probably it was thought that an University, and every College therein was a mixt Body, partly *lay*, and partly *Ecclesiastical*, and in all other Nations entitled to the Privilege of both *Forums*. And if all other Universities, *Generalia Studia* and Colleges were by certain and established Rules of the Canon Law sometimes entitled *a Ecclesiastical*, often mixt *b* and seldom or never Lay Societies, it seem'd more reasonable to take the Standard of those in *England* from other, many of them Protestant Colleges of the same Nature abroad, than from Hospitals and Lay Confraternities here at home. Especially since in all Charters and ancient Records of both Universities here in *England* their Members have usually been stiled *c Clerici*; and it hath been expressly by Charter granted; that concerning them the Kings *Prohibition* should not lye. The Universities, as they now *by Charter* send Burgessees to Parliament and are in that respect *lay*; so have they anciently sent Deputies to the Councils, particularly to that of *Constance*, and have been admitted as Ecclesiastical Societies. And therefore tho' at Common Law, no Lay Person was capable of Tithes, but the King; Appropriations however, were anciently made to Colleges, and that without Dispensation.

And tho' in Colleges of *Physicians* or *Lawyers*, this Rule may admit of Exception; yet in Societies, as that of *Exeter* College, where most are actually in Orders, and others design'd for them; it is impossible that the *end* of the institution and the *quality* of the Persons concurring, must not denominate the Society if not purely Ecclesiastical, at least not merely Lay. There is no more certain Rule in a Canon Law, than that a Corporation cannot be merely secular; where the Number of Ecclesiastical Persons equal the others, or exceed them. *e* And this Rule is still a greater Force, when the Society hath been erected and confirm'd by Ecclesiastical Authority.

a Ab in c. 12. *Literis*.

† See Vafq. de Prada de Jure Eccl. Coll. Salm. Over, *b* *Universitatem mixtum Sodalitium ac verum mixturam verius decensiusque dici Ecclesiasticum, quam profanum*. Chopin. 12. *Gulmerio de Dom. Fr.*

c 2. H. III. 5. Ed. III. 29. Ed. III. 14. H. VIII. *See Prin. in 4. Inst. p. 36.*

d *Panormitum* c. 12. *lit. 16. Jus. t. 8. Con. 253. Mendo de jure Acad. Alphonso d. Escobar. c. 21. e* *Covar. l. 2. Var. c. 20. 8. Con. Alf. d. Esc. c. 21. Anson. Augustin. dist. l. 14. Epist. Jur. Can. l. 8. & 9. Guim. de Pragm. Sancti. de univ. 207.*

^a In *Dr. Patrick's Case*, *Moreton* holds, That most Colleges are Spiritual; *Windham*, That in some respect all Colleges to an elemosynary end are Spiritual, in some Lay; and *Keeling*, That they were *quodammodo* Spiritual.

^b *A. 9. & 10. Eliz. Mich.* It was adjudg'd by all the Judges, *per opinionem omnium Justitiariorum utriusq; Banci & Capitalis Baronu Saccharii*; that *Trinity College* in *Cambridge* was in some respects Spiritual: and within the Statute of 1 and 2 *Phil. and Ma.* which make good devyses to Spiritual Corporations.

And therefore Colleges, tho' not merely Ecclesiastical, yet out of a just caution, are excepted out of the Statute of *Chanteries*.

^c *Collegia instituta pro sustentatione studentium pauperum & aliorum Egenorum sunt loca pia; & gaudent Privilegiis Ecclesie & de Jurisdictione Ecclesiastica & si sint instituta seu erecta Autoritate Ecclesiastica non solum sunt sola pia sed etiam Religiosa.*

It was laid down then probably upon these or the like Authorities, that an University was not merely a *Lay Corporation*; and that Colleges being parts of the Body, and Coporations within a Corporation, were of the same nature as the whole.

2. If the Body then that was to be visited, was mixt: It was presumed that a mixt Jurisdiction, as sufficient for the redress of all Enormities therein was lodg'd in the sole Visitours thereof; and this more especially if the Person, from whom the Authority was deriv'd, could grant such Power; and the Offences, that were to be punished by the Visitour, could not be enquir'd into without it; and the Statutes (as is already prov'd) by plain and exprefs words did convey and warrant it.

Now the Visitation which is an enquiry into several Breaches, not only of the Law of the Land; but of Ecclesiastical Laws, and as in this case into *Herefy*, can hardly be perform'd without the concurrent assistance of Ecclesiastical Jurisdiction. And therefore when *Ordinaries* are empower'd to enquire into the Foundation, Erection, and Governance of *Hospitals*, which are matters at first sight appearing Lay and Secular; ^d they are commanded to make Correction, and Reformation thereupon, after the Laws of *Holy Church*.

^a *Hill. 18. & 19. Car. 2.*

^b *Hob. p. 122. 9 Eliz. Dyn 28. Coke 11. Rep. p. 95. See Sid. 71. Warington's Case.*

^c See *Arden. l. 10. n. 26. tit. 1. l. 4. & l. 1. n. 3. tit. 18. l. 9.*

^d *St. H. 5. 1.*

Not only the *Judices Academicarum*, but the *Conservatores* too abroad that represent the Visitours there; and the *Conservatores* of the *Templars* in England had always a mixt Jurisdiction.

And therefore says *Mendo*, *Visitatores* [of Colleges] *Episcoporum potestatem promulgandi censuras habent*; quâsi carerent, vis plurima eis decreveret ad exequendum ea, quæ expedire judicantur. *De Jure Acad.* D. 7. And so anciently in all Religious Houses which consisted most of Lay Members, and in the Visitation of them. *Canonica Visitatorum censura ad Abates pertinet.* [Dec. de Reg. c. 8. Chop. Monasticum, l. 1.

My Lord Coke thinks the Ecclesiastical Law proper to be us'd by a Visitor of all Societies founded in *Liberâ Eleemosyna*. Coke 1. Instit. 96. And this Power seem'd more necessarily lodg'd in the Visitor; because it is evident, ^b that those Fraternities whether Religious or Lay, that were once exempted from their *Ordinaries*, were immediately made subject to their Visitor; and the one Power was design'd to supply the loss of the other.

It is plain that a College is within 2 H. 5. 1. Now then, if without a private appointment, it should be visitable, as some think, by the Ordinary of the place; or as the better opinion is, it should fall into the bulk of the University, and be subject to the Chancellours Visitation; in both these Cases, it would be visited especially in Ecclesiastical Causes, as the Statute appoints, according to Holy Laws of the Church; because both Persons confessedly have Ecclesiastical Jurisdiction. And therefore it seem'd not reasonable to suppose that a Visitor of a College *ex institutione*, vested with Ecclesiastical Authority by the Statutes, should have less Jurisdiction, than one who *ex provisione legis*, was call'd in to supply the want of him.

As to the Grant it is plain, That the King can exempt any place from Jurisdiction of the Ordinary, and subject it to another Ecclesiastical or Episcopal Jurisdiction. Co. 5. 1. 4. Cok. 5. 9. 10. 14. Dav. Com. 73. H. 1. Jac. B. R. Rot. 601. Rolls Ab. 341, 10. H. 7. 18.

If then Ecclesiastical Jurisdiction be necessary for the Visitation of a mixt Corporation; especially in Causes originally of Ecclesiastical

^a See VV. 2. c. 43. Coke 2. instit. 465, n. exemptia. 6. H. 7. 14. Zetel 2. part. 60.

See Mendo l. 1. q. 26.

^b See Quarrant. Balch. Avid. de Equitibus Hierosolymitanis. Gratian. disp. For. c. 870.

Connufance; it must be prefum'd that the Kings Grant to the Founder, for constituting a Visitour gave him Authority likewise of conveying to him such Powers which were necessarily incident to his Office. The King now enjoys the same Ecclesiastical Powers in this Nation, as the Pope once did; and in all other Countries it is own'd, That the *mixt* Jurisdiction is cast upon *Abbotts* and other *Visitors*, not by Designation or Grant of the Pope, but by the necessity of their Office. [*Barb. de Jure Eccl.* l. 1 c. 17. *Suarez. de Rel.* l. 1. *Sanchez in summ.* l. 5]

And lastly since the Governours of the University have always exercised a *mixt* Jurisdiction; and the Charter of *Exeter* College entitles them to the same Customs, as the University; it seem'd reasonable to suppose that the Visitour of a College had claim in his small Sphere to the same Rights and Liberties, as the Chancellour in the University. *Cum Collegia sint partes & membra Academiae fruuntur iisdem privilegiis quibus ea fungitur, præter alia specialia, quæ ipsis sunt concessa.* [*Mendo.* p. 25.]

And this presumption is the stronger, because in other Colleges, as well as *Exeter*, the Founders, relying on these Reasons, and on this Authority have expressly granted to their Visitour the use of Ecclesiastical Censures: especially since I find that the Visitors in *H.8's* time, in the University, tho' not empowered by express words of Commission us'd to punish the Members thereof by *Ecclesiastical* Censures, as well as *Temporal*.

3. If The Body was *mixt*, and a *mixt* Jurisdiction was lodg'd in the *Visitor*; Then the Cause of the Sentence it self being originally of Ecclesiastical Connufance, seem'd properly to direct the *Visitor* to the Use and Exercise of that Power. Heresie was chiefly charg'd against him, and fully prov'd; the Contumacy receives its Nature from the Crime, and when the Principal whereupon it grew, was a Matter Spiritual; the Punishment of it is of the same *Forum*, and the Censures that enforce that Penalty, must and ought to be Ecclesiastical: For *Cujus Juris est principale ejusdem Juris erit accessorium.* *Bract.* l. 1. c. 2. fol. 401. [See also *Hankford's Opinion*, 2 *H.4.* 15.] And Ecclesiastical Process is allow'd not only in *Causis Spiritualibus*, but in *Spiritualitati annexis*, *Bract.* l. 5.

—And it is a Rule in the Register, 53. b. *Ubi cognitio causæ principalis ad forum Ecclesiasticum pertinet; & ejus accessorium pertinere debet*, [*Dennis Case, Cro. Car.* 115.] And.

And therefore as Excommunication may be for *Defamation* and *Perjury*, so it may be us'd likewise for *Costs and Expenses* adjudg'd which however *lay* in themselves are the *Accessories* and *Dependences* of those Causes. * For as *Perjury*, tho plainly in its Nature of Ecclesiastical Conuance, if it arose upon a Temporal Contract or Cause, is not triable in the Spiritual Court; so much more *Depriuation* (which is neither of it self Temporal or Spiritual, but undetermin'd) becomes an Ecclesiastical or Secular Punishment in respect of the Cause for which, and of the *Forum* in which it is inflicted.

I have offer'd these Reasons with all submission, not entering into the merits of the Cause; but laying down the probable Motives and Inducements to that Sentence: If a Bishop hath in every place Power of Excommunication in *foro anime*, and if he hath mixt Jurisdiction in the College according to the Canon Law; and the Laws of the Land, he may then by Law inflict the Sentence; If he hath not such Power, The Custom of all other Universities and Colleges, the Nature of the Cause and of his own Power, the Practice of Visitors heretofore, and the plain Words of the Founder have *miss'd* him. But howsoever the Cause be determin'd by those learned Judges that it now lies before: Certain it is, that as the Visitor in this Case could not have a more *rude*, so he could not have a *weaker* Adversary. For whether the Bishop had ecclesiastical Jurisdiction or not, he could nevertheless, as Visitor, take away the Temporal Right. To excommunicate for *Rent* is a foreign and idle supposal; for Heresie is not *materia laica*; and therefore if the Authority was mistaken, the Cause however was Ecclesiastical. Nor is there any agreement between a Mannor and a College, between a *mixt* and a *lay* Corporation: As much is the Disparity between a Lord and a Visitor, where one hath conuance only of *Temporal* Causes, the other hath power to enquire into *Ecclesiastical* Offences. There is an apparent difference between *two* Jurisdictions and a *mixt* Jurisdiction; *two* Jurisdictions may occasionally and by accident be lodg'd in the same Person; as in the Bishop of *Durham*; but a *mixt* Jurisdiction, as arising from the Nature of the Cause, is always, nor by chance but *necessity* vested in one Man, as in the *Chancellors* of both Universities. Now in one Cause the Original of

* *Fitz. Tit. Prot. M. 4. H. 3.*

the Powers is wholly accidental, and therefore they ought not to interfere and be mixt; but in the other, that which was the reason of mixing the Jurisdiction, is as strong for maintaining them *undistinguish'd*, and *subservient* to each other. In one Case it is a Rule *Quando duo Jura concurrunt, aequum est ac si essent in diversis*; in the other, *Qui utroque Jure potest facere eundem actum utroque Jure fecisse videtur*; and therefore the Chancellor of Oxford having a mixt Jurisdiction, can by Charter, confirm'd by Act of Parliament, excommunicate the Mayor for breaking the Priviledges of the University. *Coveney's Case* makes nothing against this Opinion; for it is plain, that the Matter of the Deprivation, *i. e.* the cause of it was purely temporal; the Crime was not *Herefie*, but *not entring into Orders*; the resolution that was there taken is clear; for it cannot be pretended, that an Appeal in that Case lay from the Visitor, upon *Stat. 24. and 25. H. VIII.* as upon a Spiritual Sentence, and as from a Court merely Ecclesiastical; and upon that Ground the Opinion was confirm'd in *Dr. Lewis's Case*. How far there is ground for a *Prohibition* therefore in this Case, I will not dispute; but, tho the Excommunication should be allow'd to be void; tho the *alibi* in the Statute hath been already drawn into its full extent, yet I am confident, there it but one Man in *England*, whose Opinion we need not much value, that will dream of a *Premunire*.

3. As to the Vacancy of Dr. Hern's Place.

That he may refuse some what, it is usual with this Author to make Objections himself, which no body else ever mention'd; and then to shew his Skill in answer in them. For first he proves in *Dr. Hern's Case*, that *Obsequium Officium & Exercitium* cannot extend to an Ecclesiastical Benefice; no, nor was it ever pretended that they did; but I hope *Ecclesiasticum Beneficium*, in the same Statute will reach to it. Benefices indeed oftentimes are not reputed inconsistent with Fellowships, according to the intrinsic, but an estimated Value. The real Value is usually unsettled, and as depending upon Casualties, is *floating and uncertain*; therefore the incompatibility of a Living ought to be taken from fixt and certain Rates, and those appearing on publick Record. The Kings Books, 'tis always own'd, are such

such *Regia Monumenta*; and are not the Acts of Parliament as much *Publica Monumenta*? And is not, in the Letter of the Law, as well as in the intendment of the Legislator, the latter as good Evidence of the Value as the former? Now then, since an Annuity of 100*l.* is, besides many other Advantages, settled by Act of Parliament on *S. Anns*; is not this in the nature of the thing, as inconsistent as one of *Eight*? And hath it not a stated Value different from the intrinick? And dothnot this appear in the most publick Records of the Kingdom? And is it not then ridiculous to say that the Living is not tax'd at 100*l. per Ann.* but the Parish is tax'd to make it 100*l. per Ann.* Nor can any Man that knew the Statutes of other Colleges in both Universities pretend, that this Precedent, however determin'd, can be of so universal influence. For since most of the Colleges in both Universities were founded before the making of the Records in the *First-Fruits Office*; All his Arguments for them that enforce a reference to those Records only, not by equitable Construction, but express Words, prove nothing but his Ignorance in the Chronology of those famous Foundations.

Thus much I have said for Argument only, since the *Author* after a tedious Discourse, hath as usually not touch'd the Point in question; And tho' indeed his Reasons which have been shown to be very weak, would have tempted a Man to be of another Opinion; yet I freely confess, that as to all Livings which are at all rated in the *Kings Books*; and were, if not rated, then in being; The Statute seems naturally to refer it self to those Books only, and the *Publick Records* there mention'd may, (and as I think, and always thought) in strictness of Law ought to be generally taken under that limited and restrain'd Interpretation. But, as to all *new* Livings not then in being, and consequently not rated in their Books, since erected, and reduc'd to a settled Value by Act of Parliament. I take the Provision for them to be *Casus Omissus* in the Statutes, and which by equitable Construction, and by a competent Judge, *reducendum est ad expressum*. And therefore I further conceive, that the *Vice-Chancellor* having no Power of expounding the Statutes, did well declare, That the *Fellowship* and *Benefice* were not according to the Letter of the Statutes, inconsistent; and, that Dr. *Bouchier's* Opinion was at that time, in that place, well grounded: For the Statutes are to be observ'd,

secundum

secundum planum & grammaticalem sensum, Reservata duntaxat præd' Reverendo Patri & Successoribus suis Episcopis Exon justa emergentium ex iisdem Statutis ambior' interpretatione; and therefore the Vice-Chancellor who was only let in as an Arbitrator between the Rector and the Fellows, must be guided by the Letter of the Statute; but the Visitor having always a power of interpreting the Statutes in his Visitation, and upon request, out of it, might lawfully pursue the the well, intent, and plain design of the Law. And therefore since in his Judgment, and according to the plain intendment of the Legislator, now judicially declar'd, this was reduc'd to the other ordinary Cases express'd in the Statute; The Living was, and is plainly inconsistent with a Fellowship. And at first indeed the Cognizance of the Cause being not so properly a disagreement between Rector and Fellow, as a doubt arising from the Statute, ought not to have been brought to the Vice-Chancellor, but before the Visitor; and therefore the Matter being never settled before a proper Judge, was now first judicially mov'd and determin'd; I am well inform'd by Letter from Dr. Boucher, and it appears in his Opinion it self, that he did at that time advise an appeal to the Visitor; and therefore the Reflection of this Author upon him, upon this account, is as false, as is it rude and disingenuous.

As to his Residence it is plain, that the reason of a Fellows absence from the College beyond 50 days must be *Mors seu gravis infirmitus parentum, or causa promotionis*, and then a *tempus certum* must be appointed; and leave must be given *habito respectu ad Causas Personas intervalla locorum, & circumstantias ejusmodi*. When a Fellow is then in hopes of preferment; this Statute allows absence for attainment of it, and doth not limit the time, but proposes some Rules for discretionary Limitation. But when he is advanc'd, and hath for some Years had quiet Possession of a Parsonage; Then it is this Gentlemans Opinion, that *Causa promotionis* signifies the enjoyment of a Benefice, and that an indeterminate leave, perhaps for Life, may be granted. The Author of the Account is sworn to defend the Privileges of the University, and hath, and will perform his Oath, But in the mean time he knows that the Worthy Members of that learned Body desire not to elude the Statutes of their Founders, by so scandalous and senseless *Evasions*; and that there are very few of them,

and those but in one College that will in this Case be more pleas'd with the *fair Dealing* of their new pretended Advocate; than they are hitherto satisfied with his Learning and Sense.

If then the Statutes will not excuse his Absence from the College; it is pretended that the Law will discharge him from Residence from his Parsonage. The Question is, whether Dr. *Herne* having a Parish in London, and being oblig'd to reside upon it, four Parts of five in a Year, can beyond that allow'd time of Absence be resident in *Oxford*. He answers, That Dr. *Herne* is excus'd from Residence, notwithstanding the Act of Parliament that enjoyns it, because by a subsequent act, 1 Jac. 2. The Rector is to have an House built at the Charge of the Parish; and therefore, till that be built, *Non-residence*, as involuntary, is no Crime; and in this Point he says, The Law is very clear. The Author was impos'd upon by a Case or two explanatory of 21 H. 8. It was doubted whether that Act oblig'd a Man to Residence only, in his Parish, or more particularly in the Parsonage House. If there was no House for the Parson, then the Incumbent is excus'd from that part of the Law which is impossible. For *impotentia excusat legem*; But as there is no impossibility for Residence in General, tho the House be not built, so neither do the Cases warrant or excuse *Non-Residence*. [See *Goodals Case*, Coke 6. p. 21. See *Cr. Eliz.* p. 590, 591.] And the Canon Law, which was the Ground of those Reports is clear in the Point, that he ought to live in the Vicinage, and not at forty seven Miles distance from his Parish in *Oxford*.

4. That the Visitor hath no Power by Statute of Suspending the Fellows *ab Officio & Beneficio*.

Upon this Head the Author declaims much, and long, and Dreams that the Suspension *ab Officio* especially, is so far from being warranted by Statute, that under the Pain of Perjury it cannot be submitted to by a Fellow. It would be easier to prove, that his Penalty being less than Expulsion, may without express Words or Statutes be legally inflicted by the Visitor. Putting out of Com-

Barbosa de Offic. Par. p. 1. c. 8. n. 41. Debet Residere Parochus in domo Parochiali, ipsa deficiente, residere debet in domo aliqua quæ sit intra Parochia limites, & ita Ecclesia contigua ut commodè possit Ecclesia deservire. See Cock, de Jure & Just. p. 67.

Parochus non habens commodam habitationem in Parochia dispensatus est ut possit in loco vicino, residere Sess. Triid. 23. p. 216.

mons, is a *Suspension à Beneficio*, and of that, if they were worth any thing, Dr. *Bury* hath afforded us Precedents: Other Reasons might be suggested, were it not a very convincing one, that the Statute it self, which this Gentleman might have read, expressly enjoys this Punishment. *Eliamſi ad privationem aut amotionem Rectoris, Subrectoris vel alterius cuſcuſq; ab Adminiſtratione ſua vel Officio procedat.*

5. *Whether the Viſitor ought to have been Judge in his own Cauſe, or pronounc'd for his own Jurisdiction.*

It is ſaid indeed, that is againſt Natural Equity to make a Man Judge in his own Cauſe, and that an Act of Parliament that ſhould eſtabliſh ſuch a Practice, would be void: And this General Maxim, groſſly miſtaken, and miſapply'd, hath impos'd upon this Gentleman. A Man that is not Judge of his own Cauſe, may, and every where does pronounce for his own Jurisdiction, and over-rule the Exceptions of the Criminal. When his Property is concern'd, a Judge muſt withdraw, but not when the Authority of his Court is queſtion'd. *Quilibet Judex poteſt pronunciare pro ſeipſo, quia licet illud non det ei jurisdictionem; tamen conſtituit ipſum in quaſi poſſeſſione Jurisdictionis: propter quod habet juſtam cognitionem, & pronounciationem.* [Abb. in c. cum Ordinem in fine de reſumpt. Mart. de Jurisd. c. 4. p. 2. & c. 18. n. 8.]

That the Concurrence of the Fellows to the Rectors Expulſion was not Statutable.

If the others had appear'd, they had not been ſuſpended, and then they had been proper Judges; ſince they did not appear, and were juſtly puniſh'd, they became *Participes Crimnis*, & *Perſonæ Inhabiles*, and conſequently in Law and Reason, as to any Exerciſe of Jurisdiction, were reputed *absent*.

He purſued therefore the Statute ſtrictly, and the Expulſion of Dr. *Bury* was not more juſt in it ſelf, than legally carried on. When thoſe Fellows that had oppoſ'd the Jurisdiction of the *Viſitor*, were ſtatutably ſuſpended *ab Officio*; then it is very weak to talk of the Biſhops taking in others, when the Statute had devolv'd the Authority on thoſe that were in place neareſt to them. And therefore the conſent of no others could be had, than of ſuch as were not incapacitated to give a legal Concurrence.

Lastly, the Contumacy is no statutable Cause of Expulsion, and if it were ought in the Case of the Fellows as well as the Rector, to receive the same Punishment from the Visitor.

If a Man had not been us'd to *like* arguing thro the Book; he would be surpriz'd at the last Exception in the close of it. *Contumacy* is not recited as one of the Crimes for which the *Rector* might be expell'd, and therefore is no good Cause of Deprivation; so that if a *Rector* when an *Heretick* and *Incontinent* made a *weak* Defence, he *might* be depriv'd, if he made none, he *must* be safe and secur'd.

Contumacy upon a Charge includes the Offence it self, and aggravates it, it amounts in Construction of Law to a *Confession* of the *Crime*, and to a *Contempt* of the *Judge*; and any Court that hath no Power of punishing it, hath in effect no Power at all. The Statute says, *Ostendantur ei detecta, quibus si non possit rationabiliter & honeste respondere, amoveatur*: and I leave this *Gentleman* to prove that a refusal of appearance before a *proper Judge*, is a sufficient Answer to a Charge.

As to the second Exception, it is clear, that the same *Contumacy* is not only respected in Law but the ground of it. When the charge is different; the *Contumacy* may be the same, but neither the *Crime* is, nor the *Punishment* ought to be equal. That which bears nearest resemblance to *Contumacy* in Common Law is *Outlawry*: *Outlawry* in *Trespass*, is no Forfeiture of Land, as *Outlawry* in *Felony* is; the *not-appearing* in both Cases is the cause of *Outlawry*, yet the Force of the *Outlawry* shall be esteem'd according to the heinousness of the Offence, which was the Ground and Foundation of the Process. His Lordship therefore had not equal Reason to expel the *Fellows* as the *Rector*, but wonders much that in the Case of *Exeter College*, the greatest exception against his Proceedings should be his tenderness to the *Fellows* thereof.

Thus the whole State of this Controversy hath been enquir'd into and settled, and thereby not only the immaterial Objections, which have already been made, are answered, but all future Exceptions are prevented. The Powers of a *Visitor*, as has been prov'd, are general, and not more fixt by private appointment, than ascertain'd by Law: Appeals from this *Domestick Judge* are by Statute taken away, but no recourse to him, either in this or any other *College*, hath ever been deny'd. It is evident then, that the *Commission* of Appeal was rightly granted, and it is equally clear, that the *Visitation* has been Statutable and Legal, and if (as is now plain) the *Jurisdiction* of the Judge was certain, and the Process warrantable, none of the Adversaries themselves will dispute the Justice of the Sentence.

A N
A N S W E R
T O T H E
Account Examin'd.

SINCE the *Account Examin'd* is a Panegyrick on Dr. *Bury*, it is easie to discover the Author, and to find out the only Man in *England*, that would write well on that Subject. The *Answer* to it, as anticipated by M. *Colmlr*, will here be very short; especially, since the whole Pamphlet is at best only a bold denial of his own Crimes; and is oftentimes a Confession of the Charge. The Author of the *Account* had published nothing against him, but what was warranted by Authentick Vouchers; and it is not his fault if the faithful and exact History of a Mans Life, becomes the severest Saryr against him. Malice is ridiculously charg'd upon the Author against a Person wholly unknown: He knows no more of him, than of *Socinus*, or *Sandius*; but that his Principles are fully as bad; and his Learning much less. The little immaterial Exceptions, that are taken to the *Account*, are all false; but would for the most part be wholly impertinent to the purpose, if true. The great Inconstancy of which the Author of the *Account* is guilty, is that the Enormous Crimes of the Rector, are sometimes made the Cause of the Visitation; and sometimes the Discovery

covery of them is gloried in , as the Effect of it. The notorious Scandal was the Cause of the Visitation; and the Discovery of the Crimes by legal Proof, was the Result of it. The suspicion of *Hereſie* and *Incontinency* was violent, and occasion'd the *Viſitours* Enquiry: The Proof of the Charge was plain, and brought on the Decree of the *Univerſity*; Crimes may upon violent Presumptions be known before a Tryal; and yet the Tryal it ſelf, and the Witneſſes therein produc'd, muſt concur to the legal Conviction of the Criminals.

1. As to the *Naked Goſpel*, It hath already been cenſur'd and burnt; and after the Decree of that *Learned* and *Judicious* Body upon ſo *Infamous* and *Heretical* a Book, it would be much more Prudence for him *once more* to recant his Tenets, than to defend them. For let his Friends of the *Polonian* Faith beyond Sea, know, That never any Decree was more unanimouſly ſign'd, nor more willingly aſſented to by the Right Reverend, and Reverend the Heads, and the worthy Members of the whole Univerſity.

The manner of Chriſts Generation was not the Queſtion, but his Divinity: And it is a very extenſive Charity indeed, that takes in all Chriſtians, but at the ſame time excludes Jeſus Chriſt. If thoſe bold Assertions (as he ſays) fell from him through Heat; I believe the ſame warmth continued, when he took *Ann Sparrow* into his Houſe; when he expell'd Mr. *Colmar*, and oppos'd the *Viſitour*. When the Author calls *Jeſus Chriſt* a Crucify'd Vagabond, he ſays, That he perſonated an *Infidel*; and the Vizard that then was put on, was not, I believe in the whole Book taken off.

If none under a Dean may read *Socinians Books*; it seems however, that one under that Degree may *write* them; and the Copies of the *Naked Gospel*, if fitted for Deans only, ought not to have amounted to 500. However, The Gentleman, I see, quotes Cantons which he never read; nor can it be well expected, That he should be acquainted with the Rules and Orders of a Church; who denies the Chief Articles of her Faith.

As to his *Immortality*: The Affidavits that were there made in the Visitation were my guides, and afterwards his own Confession hath confirm'd most of those Depositions. He boasts much of his Loyalty, which it is not my business to deny: The charge is *Heresie, Incontinence and Bribery*, and the Plea is; that he is not guilty of *Treason*. I am glad indeed that he is free from any one Crime, but at the same time it is hard, that a Man shall be excus'd for *Crucifying* his Saviour, because he is *Cæsars Friend*. It is not my business to look into his Life: The History of the Visitation I have strictly pursued, and even in that out of respect to his Character, omitted a very scandalous part of the Charge. It is the disingenuous task of other Men to publish *false and surreptitious Affidavits*: What I have at any time set forth hath been so clearly, and judicially prov'd; and wholly made out, that after all his Subterfuges, the Criminal himself dares *not* disavow it. For doth he deny that being then Pro-vicechancour *inauditâ perfidiâ* (which are the words of the Decree) he oblig'd *Litchfield* by colour of his Authority to print the *Naked Gospel*? Is he the Author of that Heretical Treatise or not? did he call his Saviour *Crucify'd Vagabond*, or will
he

he deny the charge? Doth he not own that he sat at St. *Athanasius* Creed? That he sold the Places and Offices of the College; and was guilty of Bribery and Extortion? In short, there is no part of the Charge, that is totally disavow'd but Adultery, and yet that crime too as it was clearly made out in Visitation; so since by supplemental Evidence is confirm'd. And therefore it is left to the World to judge, how far the Church, and Nation in general are oblig'd to the seasonable care of the University for censuring and burning that Blasphemous and Heretical Book; and to the Right Reverend the Bishop of *Exeter* for expelling the Author of it.

A
COPY
OF THE
PROCEEDINGS
OF
Dr. *MASTER*
UPON
The Commission of Appeal.

H

A
COPY
OF THE
PROCEEDINGS
OF
THE MASTER
UPON
THE Commission of Appeal.

Reverendo admodum in Christo Patri ac Dom. Dom.

JONATHAN Permissione Divinâ Exon. Episcopo Collegii Exon. in Universitate Oxon. Patrono & Visitatori Ordinario, Edvardus Master Legum Doct. Vicar. vester in Spiritualibus Generalis & Commissar. vester in hac Parte special. constitut. omnimodas Obedientiam & Reverentiam Paternitati vestræ Reverend. Tenore præsentium innotescimus, significamus & certificamus, quæ Vigore & Virtute Commissionis vestræ mihi in hac Parte fact. & direct. & debet. cum Reverentiâ præsentat. & tradit. processum fuit, & est prout sequitur. (viz.)

*Die Sabbati (viz.) Vicesimo secundo die Mensis Martii, Anno Dom. (Stylo Angliæ) 1689. inter horas nonam & undecimam ante Merid. ejusdem diei in Capella Collegii Exon. in Universitate Oxon. coram venerabili & egregio viro Edvardo Master Legum Doctore Reverendi admodum Patris Domini Jonathani Permissione Divinâ Exon. Episcopi, Patroni & Visitatoris Collegii Exon. predict. Ordinarii Commissario vestro judicialiter seden. in præsentia mei Johannis Greenway Notarii Publici subscript. in hac Parte specialiter assumpti. **

Negotium appellationis præmatum per Jacobum Colmer Artis Magistrum Collegii Exon prædict. Socium contra Doct. Bury, ejusdem Coll. Rectorem Georgie Verman Coll. prædict. Subrector & alios &c. Quibus die hora & loco coram præfato ven. & egregio Viri Edvardo Master Legum Doct. judicialiter seden. comparuit Thomas Wood Legum Bacc. ex parte Reverendi admodum in Christo Patris ac Domini Domini Jonathanis permissione divina Exon Episcopi Collegii Exon prædict. Patroni & Visitatoris ordinarii exhibuit Literas Commissionales ejusdem Reverendi Patris Patroni & Visitatoris prædict. præfati Edvardo Master Legum Doct. direct. quas eidem Ven. & egregio Viri Edvardo Master debita cum Reverentia tradidit & presentavit humiliter petens quatenus præfat. Edvardus Master onus Executionis earundem Literarum Commissionaliū in se assumere & acceptare & juxta vim formam tenorem & effectum earundem procedere & pro Jurisdictione sua sen potius vestra in hac parte decernere dignaretur quibus per eum debita simili reverentiā receptis & publice tunc & ibid perlectis dictus Edvardus Master onus Executionis Literarum Commissionaliū hujusmodi ob honorem & Reverentiam dicti Reverendi Patris Patroni & Visitatoris Committen. &c. In se assumpsit & accepit & procedend fore decrevit in hujusmodi negotio appellationis juxta & secundum omnem vim formam tenorem & effectum earundem & Juris in hac parte exigentiam neque Jo. Greeneway Na. Pub. in actorem scribam sive Rex. pro expeditione hujusmodi Negotii appellationis assumpsit tunc facta trina preconizatione pro dict. Arthur Bury S. Th. Professor. Coll. prædict. Rectore Georgio Verman Subrectore Ezra Cleveland, Thoma Lethbridge Richardo Hutchins, Beniamino Archer, Samuel Adams & Philippo Thorne sociis Collegii Exon prædict. ad interessend. istis die hora & loco usque citatis ad respondend. dicto Jacobo Colmer in hujusmodi Negotio appellationis comparuerunt Personaliter venerabilis Vir Arthur Bury S. T. P. Rector dicti Collegii necnon Georgius Verman Subrector ibid Ezra Cleveland, Thomas Lethbridge, Richardus Hutchins & Philippus Thorn sed Benjamin Archer & Samuel Adams non comparuerunt quorum penas Dominus reservavit in prox. Tunc comparuit Jacobus Colmer pars appellans & constituit Magistrum Thomam Wood Legum Bacc in ejus legitimum procuratorem ad agend. &c. quod statim in se accepit & fecit se &c. Thoma facta denovo trina preconizatione pro dict. Benjamin Archer & Samuel Adams eis-

que

que non comparen. &c. dictus Wood in presentia Doctoris Bury Georgii Verman, Ezræ Cleaveland, Thomæ Lethbridg, Richardi Hutchins & Philippi Thorn comparen. & in penam Contumaciæ dicti Archer & Adams absen. Loco Libelli exhibuit Protocol. appellationis quod Dom. admisit quatenus de Jure &c. Deinde dictus Wood exhibuit Inhibitionem & Monitionem pro transmissione totius processus in hoc negotio habit & facti & allegavit easdem fuisse & esse debite execut. juxta Certificat. authentic. sub sigillo Officialitatis Berks factaque deinde tria preconizatione pro dicti Archer & Adams non comparen. Dominus in penam non comparen. & in presentia comparen. monuit eos ad intraducend. processum in prima hujus causæ instantia facti. &c. post merid. & ulteriorem executionem dictæ commissionis continuavit & prorogavit ad publicam Cameram infra dicti Collegium Exon. notorie situat. inter horam secundam & quartam pomerid. hujus diei monitis partibus presen. ad tunc ibidem interessend. & in penam Archer & Adams non comparend. Cont. Cur. &c.

Eodem die inter horam Secund. & quartam pomerid. coram præfato Edvardo Master Legum Doctore Commissario antedicti in publica Camera in Collegio præd. pro Tribunal. seden. vocatis prius præfatis Doctore Bury, Georgio Verman, Ezra Cleaveland, Thom. Lethbridg, Richardo Hutchins & Philippo Thorn factaque tria preconizatione pro dicti Benj. Archer & Samuel Adams eisque non comparen. comparuit Wood Procurator dicti. Jacobi Colmer & in presentia dictor. Doctoris Bury, Georgii Verman, Ezræ Cleaveland, Thomæ Lethbridg, Richardi Hutchins & Philippi Thorn. Comparen. & in penam Contumaciæ dicti. Archer & Adams absen. petiit procedend. fore juxta formam retroactorum in presentia dicti. Doctoris Bury, Georgii Verman, Thomæ Lethbridg & Philippi Thorn exhiben. scriptum quoddam continens protestationes suas manibus suis propriis subscript. & attestat. quod petierunt admitti & inactitari sic Incipiens in Visitatione Collegii Exon. &c. Et sic terminans privilegiis nostris hac ex parte intemeratis quod scriptum Dominus ad eorum petitionem admisit quatenus de Jure sit admittend. & non aliter neque alio modo Interrogatis prius Magistris Ezra Cleaveland & Rich. Hutchins duobus ex Sociis dicti. Colleg. Exon. Senior. an velint dicti. script. sive Protestationem attestari sub manibus suis dicti. Cleaveland & Hutchins expresse renuncian. & eidem non consentientibus. Tunc Dominus ad petitionem dicti. Doctoris Bury reservavit potestatem subscribendi dicti. Instrument dictis Archer & Adams absentibus si eidem Instru.

ment. subscribere voluerint cum venerint. Postea Dominus non obstante protestatione præd. Doct. Bury, Georgii Verman, Thomæ Lethbridg & Philippi Thorn decrevit procedend. fore in hoc Negotio & monuit dict. Doctorem Bury aliosque compareri. ad introducend. processum in hoc Negotio juxta Monitionem eis Judicialiter fact. eis vero non introducentibus Dominus Wood accusavit Contumacias dictor. Doctoris Bury, Georgii Verman, Ezræ Cleaveland, Thomæ Lethbridg, Richardo Hutchins & Philippi Thorn in non transmittendo vel exhibendo processum in primâ hujus pretensæ causæ instantiâ habitæ & fact. & petiit sententiam ferri &c. dictis vero Doctore Bury, Georgio Verman, Thomæ Lethbridg & Philippo Thorn alleg. quod virtute Stat. Collegii præd. processum in causa amotionis vel expulsionis teneantur procedere summarie & de plano & sine strepitu Judiciali eaque de causa nullum processum in Scriptis habuisse aut habere nec proinde posse exhibere nec ullum Stat. violasse. Tunc factâ denno trina præconisatione pro dict. Archer & Adams eisque non compareri. Dominus Wood in penam eorum contumac. & in præsentia compareri. obtulit Sententiam definitivam quam petiit admitti ferri legi & promulgari sed Dominus ad petitionem dictor. Doctoris Bury, Georgii Verman, Thomæ Lethbridg & Philippi Thorn continuavit & prorogavit ulteriorem expeditionem hujusmodi Commissionis & finalem auditionem hujusmodi Causæ in Diem Martis prox. inter horas Secund. & Quart. pomerid. ejusdem diei hoc in loco Monitis partibus tunc præsentibus &c. Cont. Certificatorio &c.

Postea Die Martis (viz) Vicefimo Quinto Die Mensis Martii Anna Dom. 1690. Inter horas tertiam & quartam pomerid. in hac parte Assignatas in publica Camera Colleg. Exon. præd. coram præfato venerabili & egregio Viro Edvardo Master Leg. Dict. Com. antedict. pro tribunal. seden. in præsentia mei Jo. Greenway Not. Pub.

Quibus, &c. factâ trina præconisatione pro dict. Doct. Bury, Georgio Verman, Ezra Cleaveland, Thomæ Lethbridge, Richardo Hutchins, Benjamine Archer, Samuel Adams & Philippo Thorne Comparuerunt & Exhibuerunt Scriptum quoddam de novo continens protestationes suas manibus suis subscriptæ & attestatæ (exceptæ Cleaveland & Hutchins) quod petierunt admitti & inactitari scilicet incipiens In visitatione Collegii Exon. Et sic terminans protestantes irritum fore quicquid contra Acta nostra Statutum fuerit. Quod Scriptum petierunt admitti &c. Dominus admisit quatenus de Jure sit admittend. & non aliter

aliter neque alto modo: Tunc Dominus pronuntiavit pro Jurisdictione sua &c. Et Wood petiit processum coram eisdem fact. juxta Monicionem introducend. fore &c. Qui responderunt se non habere alium processum quam qui Protestationi hac Die dat. annex. est Moniti deinde ad proband. dict. processum ad petitionem Wood responderunt se non teneri Dom. judican. probare sufficere sibiipsis liquid. & verum.

Tunc dictus Wood obtulit & porrexit Dom. judican. sententiam definitivam pro Parte sua, quam petiit admitti, ferri, legi & promulgari in presentia dictorum Doctoris Bury, Georgii Verman, Ezræ Cleveland, Thomæ Lethbridge, Richardi Hutchins, Philippī Thorne, Benjamin Archer & Samuel Adams nihil peten. Dom. ad Petitionem Dom. Wood admisit, tulit, legit & promulgavit Sententiam predictā. sic (ut permittitur) per dict. Wood oklat. & porrect. decernendo, pronunciando, declarando, adjudicando, restituendo & in Expensis condemnando ceteraque faciendo prout in eadem Sententia plenius continetur, presentibus tum & ibid. Adolpho Meetkerk Coll. novi in Universitate Oxon. Artis Magistro & Seymor Tredenham Collegii omnium animarum in dict. Universitate Juris Civilis Scholari Testibus ad premissa testificand. special. rogatis & requisit. in presentia mei Johannis Greeneway Not. Pub. & Reg. assumpti, &c. super cujus quidem sententie prolatione, &c. Dom. Wood requisivit pub. instrument. confici & in assertari.

Tunc Dom. Wood obtulit Billam expensarum quam petiit admitti & taxari Dominus ad ejus petitionem taxavit eand. ad summam viginti Marcarum (factā prius fide predict. Wood Client. suum exposuisse, &c. & expositurum esse summam taxat) & Dom. assignavit pro solutione dictarum expensarum in vel citra primum diem Mensis Maij prox. & judicial. monuit Dominos Doct. Bury Georg. Verman Ezra Cleveland Thomam Lethbridge Richardum Hutchins Philippum Thorne Benjam. Archer & Samuel Adams dict. sum. taxat, pred. Mr. Jacobo Colmer seu ejus procurat. in vel citra diem pred. Tunc Dom. Wood petiit sententiam executioni demandari partemq; suam actual. restituere & nomen suum in Libro promptuarii sive Registro dicti Collegii inscribere unde Dominus nomen Mr. Colmer inscripsit tum in ea parte Libri predict. qua primo deletum sive omissum fuerit tum in ea parte ubi hoc die Nomina sociorum scribuntur & inseruntur.

Quæ omnia & singula sic (ut permittitur) Coram Nobis Gesta habitā & facta vera esse Paternitati vestre certificamus eademq; unā cum Li-
teris

veris vestris Commissionibus Appellatione Mandato vestro Citatio Inhibi-
ditiva cum Monitione pro processu originali una cum sententia nostra diffi-
ditiva presentibus annex. Clausum & sub Sigillo Vobis transmissimus.
Incujus Rei Testimonium has Literas Testimoniales frue hoc presens
publicum Instrumentum exinde confectum sigillo publico & auctoritate
Officialitatis Berks sigillari & communiri & per Jo. Greenway
Not. Publ. Actor. nostrorum. in hac parte scribam subscribere & subscribi
fecimus Dat. secundo die Aprilis Anno Dom. 1690.

Edw. Master LL. Dre. diocesis Ebor. Cancellarius.

Et ego presens Jo. Greenway Regia auctoritate Not. Publ. Quia pre-
missis omnibus & singulis dum sic (ut presertim) coram Com. predicti
agebantur & fiebant presens personaliter interfui Ea; omnia & singula
sic fieri, vidi, scivi, audivi & in formam predicti inacti qui ac manus
mea propria scripsi & redeg i Ideo nomen & cognomen meum subscripsi ac
sigillum meum tabellionale solitum & consuetum presentibus apposui in
fidem & Testimonium premissorum ad id specialiter rogatus & requisitus.

Ita Testor. Jo. Greenway Not. Publ.

The Proceedings being Printed off in haste, the Reader is desired to correct the fol-
lowing Faults therein: and these Errata in the Defence.

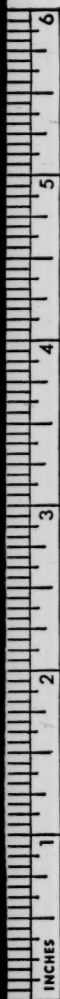
ERRATA.

Page 1. line 14. after therefore dele that. p. 16. v. 11. dele. A. 12. v. 11. Exc.
p. 17. l. 1. dele qui. l. 2. dele or. p. 14. l. 6. v. 1. provisionary. v. 16. declared.
p. 15. l. 1. r. alii. p. 16. l. 2. r. Fellows. l. 18. r. propriety.



1691

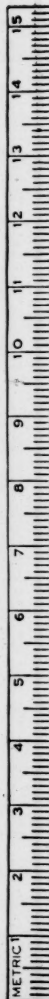
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PPA
DEFENCE

Offer'd Defence OF THE
3/
PROCEEDINGS

46
Of the Right Reverend

The VISITOR

AND

FELLOWS of *Exeter* College

IN

OXFORD.

With an ANSWER to

1. *The Case of EXETER College related and vindicated.*
2. *The Account Examined.*

[James Harrington]

LONDON: Printed for *Tho. Bennet* at the Half-Moon in
St. Pauls Church-yard, 1691.

159

1691

THE PREFACE.

THE Cause of the late Rector of Exeter hath been defended with as little Reason and as much Rudeness as it was at first carried on; and yet after all these Affronts and Indecencies, the Visitation of the Bishop of Exeter was not more legal in it self, than the Proceedings after it have been just and honorable. When the late Rector, upon the plain proof of scandalous Crimes had justly been expell'd, and his removal wou'd have contributed to the quiet of the College, and to the peace and honor of the whole University; the Visitor however declin'd the exercise of that power, which in those private Societies his Predecessors have always us'd, and depriv'd him of his Office, not of his Possession. Of all the Heads of Colleges that ever were in that University, Dr. Bury is undoubtedly the first, who, after the Visitor's Sentence, enjoy'd the favour of an Ejectment.

Some time after, as soon as the Bishop was inform'd that Dr. Bury expected Redress in the Courts of Westminster, He, upon his own motion, desir'd and obtain'd leave of moving his Privilege in the House of Lords. When afterwards the Cause depended before proper Judges in the Court of Kings-Bench, Mr. Painter, upon his Lordship's desire, endeavour'd to hasten the Tryal, and the other party, upon a just distrust of their success, were as earnest to retard and prevent.

prevent it. *These fair and honorable Procedures, which ought to have been prais'd and commended by an ingenuous Adversary, are nevertheless no fences against the malice of a weak and insolent Libel. The scandals, coming from such hands, neither need nor deserve an Answer, especially since they are level'd against a person who is much above the reach of those Calumnies.*

The Interest, which the Visitor pursu'd, is already secur'd; the College which his Predecessors founded, is, by him, reform'd; and that Society which in respect of the Tenets there publish'd, and the Enormities there committed, was the disgrace of the University, is now a creditable Member at least, if not an Ornament to it.

The Duty which the Bishop ow'd to the Church and University, is already successfully discharg'd; the care and preservation of both is now happily entrusted to other hands. The powers that he executed were lodg'd in him by his religious Predecessor; He, by appointment, is sole Patron and Conservator of that Society, and represents the Founder in his College, as well as succeeds him in his Diocess.

The Heresie, Bribery, and other gross Immoralities, clearly prov'd upon the late Rector, occasion'd the Sentence, and after it the Censure, unanimously past by the whole University upon his blasphemous Book, sufficiently confirms and justifies the Expulsion of the Author.

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DEFENCE, &c.

MOST of those that have read the *Case of Exeter College related and vindicated*, are sufficiently convinc'd that so *bad* a Cause stood in need of *better Advocates*. The Pamphlet (as the Preface intimates) was design'd to draw over the *unthinking part of their Adversaries*, and whatsoever influence it may possibly have had upon them, it hath not fail'd of a contrary effect on the *thinking part of their Friends*. The only Art (if any) of the Discourse is, That it is intricate and confus'd, and perplexes the Cause which it cannot *refute*. And therefore the plain and direct Method of answering it, is to reduce the Controversie to a Point; and afterwards, in short, to consider the *wide and immaterial Exceptions* to it.

The single Point then now in Issue is, Whether Mr. *Painter* be *Rector of Exeter College*: His Admission must intitle him to that Office, and an Avoidance must preceed and warrant his Admission: If Dr. *Bury* then was rightly remov'd, there was room for a new Choice; And, since no other Objections are made, upon the lawfulness of his Expulsion the Validity of Mr. *Painters* Title depends. The most *notorious Heresie, gross Incontinence, and scandalous Bribery,*

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are admitted to be good Causes of Expulsion; but it is pretended that the *Bishop of Exeter* had no *Consuſance* of the Cause, and consequently no Power of inflicting the Punishment.

That the Bishop is *Ordinary Visitor*, and *Patron* of that College, is not to be deny'd, and that none else have any *Visitatorial* Power therein, is admitted: But a scruple is rais'd, whether, and how far this Power is subject to *Restrictions*, when it is *suspended*, and how *reviv'd*: What are the imaginary *Extent* and *Bounds*; When the absence and return of this *intermitting* Authority.

It is pretended then, that the Bishop of *Exeter*, tho' *Ordinary Visitor* of that College is barr'd from any Power of receiving Appeals, and is restrain'd from any other than a *Quinquennial* Visitation: And that therefore, upon the Execution of the Appeal by Dr. *Master* within the *Quinquennium*, the Bishops Authority of making a Visitation is determin'd.

To prove this Opinion, two Assertions must be laid down.

1. That the Visitor of Exeter College hath no Power of receiving Appeals.
2. That the Execution of a Commission of Appeal, amounts to a Visitation.

For if the *Visitor* had both Powers lodg'd in him, it is not pretended that the Execution of one determines the other; and therefore *their* Cause depends on the Truth of both; ours on the Falsity of either of these Propositions.

These Positions are so absurd in themselves, and so ill defended by the Promoters of them; that they are refuted
as

as soon as *explain'd* ; and the whole Controversie will vanish at the same time that the Terms are settled. It will not be immaterial therefore to discourse of the true meaning and extent of the Words *Visitor*, *Ordinary*, *Appeal* and *Visitation*, and from thence to discover the gross Errors and Mistakes of the late Pamphlet.

And herein I must take leave to make use of not only the Authorities of *Common Law*, but in a great Measure to call in the Assistance of the *Canon*. For since the Statutes of Colleges have a necessary dependence on the *Ecclesiastical Laws*, since their Elections, Controversies, and Proceedings are regulated by *them*, since lastly Visitation it self, if it is not *now* always circumscrib'd to *Spiritual Societies*, was yet originally us'd in *Churches* only, and *Religious Places* and still pursues the usual Forms of the *Canon Law* ; it is absolutely necessary, and is usual in the *Year Books*, in Cases of this Nature, to receive from the *Canonists* the Explanation of those Terms which are borrow'd from them. And therefore tho the late *Author* hath been pleas'd to *desie* the *Civil* and *Canon Law*, yet all judicious and learned Men are satisfied, that as it is much easier to condemn any Science than to attain it ; so in a Cause of *Spiritual Conu- sance*, or which is nearly allied thereto, it is much better to *have Canon Law*, than to *want Common* : For if we look into the late Case we shall find, that this sworn Adversary to *Ecclesiastical Laws*, took not his Malice against them out of any great propensity to *Temporal* ; and that Ignorance of *one part* of Learning is no certain pretence to *another*.

A *Visitor* then who is in Law, always the *Patron* of a Society, and a *Conservator* of the *Local Statutes* thereof is intrusted by Law to reform all *Abuses* and *Disorders* therein, and to *redress* all *Grievances* of the Members thereof.

The Appointment of this Person, who is to be *Visitor*, is the Act sometimes of the Law, and frequently of the Party: But when ever any Person by good Authority is made *Visitor*; the Law it self casts upon him all the Powers incident to, and necessary for the Discharge of that Office. A *Visitor* is a Term of as certain, and as determin'd, tho perhaps not of so well known a Signification, as an *Executor*; and therefore tho the nomination of the Person himself may be from the Party, the Authority is always ascertain'd by Law, the one is *ex Institutione*, the other *ex Provisiōe Legis*. And tho these Powers may be divided, and plac'd in several Persons, as *Visitors*, *Ordinary* and *Extraordinary*; yet where-ever any Person is constituted *sole Visitor*, and all others are expressly excluded; there the *General Appointment* vests him with all Authority requisite to the performance of his Duty. For if the Place be of necessity visitable, then the *Rights* of *Visitation*, where-ever they may be lodg'd, and to whomsoever transferr'd, cannot however be diminish'd, much less taken away. And therefore any *discretionary Rules* given to a Person who is confel'd to have the sole Authority of *Visitation*, ought to receive, especially if they fairly can, such an Interpretation as is consistent with the known Powers of a *Visitor*, and the Will of the *Founder*. For whosoever by plain Words constitutes a *Visitor*, and afterwards is conceiv'd by doubtful Expressions to
deprive

deprive him of the Power necessary for that Office, must either design to *transfer this reserv'd Authority* to some other, or for some time at least to *exempt the Place* from any *Visitation*. Now if the *Exemption* of such a Place from Visitation, for any time, upon any Grievance or Enormity committed, be repugnant to *Law*, and the letting in of another *Visitor*, be evidently contrary to the declar'd Will of the *Founder*; then it follows, that these restrictive Directions may and ought to be so construed, as may neither be repugnant to the Will of the *Founder*, nor derogatory to the *known Law* of the Land.

This *General Power* of *Visitors*, is not only (as will afterwards appear) allow'd in all Books ^a of *Canon Law*; but is likewise frequently in the *Year Books*, and other Reports of *Common Law* presum'd and acknowledg'd.

Littl. Sect. 139. 'If they which hold their Tenements in ' *Frankalmoign* will not, or fail to do Divine Service; The ' Lord may not distrain, but may complain of this to ' their Ordinary or Visitor, praying him, that he will lay ' some *Punishment* and *Correction*; for this, and also provide, that such Negligence be no more done, and the *Ordinary* or *Visitor* of *Right* ought to do this: And *Coke* p. 96. Expounds of *Right, de Droit*, in the Right of his Office: And therefore ~~that~~ the Powers that belong to the Office of a Visitor, are such as can correct at any time *all Failures* and redress them.

^a *Fra. de Pav. de Vis. Marianus Soc. de Vis. Zetola v. Vis. Mendo de Jure Acad. de Vis. Acad. Chopin. de Monast. § de eorum Vis.*

Term. Mich. 9. H. 6. fol. 34 & 33. The Visitor, or Sovereign Paramount of the Order, hath power to visit an *Abby*, and those Powers are declar'd to be General, *Ordinary* and *Extraordinary*.

And therefore by the Statute 2 *H. 5. 1.* Visitors are appointed to enquire into the *Governance* and *State* of *Hospitals*, &c. and of *all other Matters* (without restriction of Offences or limitation of time) and to *reform*, and to *correct* them: and in the Case of *Sutton's Hosp.* 10. Rep. p. 5. To visit, is explain'd by, to order and reform all *Disorders* and *Abuses* in and touching the said Hospital. *⁹* *Visitator est fidei Commissarius*, is the Trustee and Representative of the Founder, and hath the same Power in the *Government* and *Preservation* of the College, as the Founder himself; and therefore it is evident, that in both *Laws* the *Universal Jurisdiction* of all Causes relating to the *State* of the Society, and the *Governance* thereof is of *Right*, and of *necessity* committed to the Visitor.

Now if this Rule holds in the Case of a Visitor in General, it is infinitely more strong for him, who is constituted *Ordinary*, or *Ordinary Visitor*; For that Word, as well in Canon, as in Civil Law, (and since, as thence receiv'd) in *Common*, implies and carries with it *original* and *universal Jurisdiction*. An *Ordinary* is distinguish'd as from a *Delegated*; so from a *restrain'd Judge*, he hath within his *Sphere*, and within his *Forum* (whether *Secular*, *Ecclesiastical* or mixt) the *Conusance* of all Causes

See *Sidesf.* p. 71. *Widrington's Case*, and 8 *Aff. Ed. 3.*

P. 1. c. 1. *Ordinary*. See *Meinard Piclav. Antecessor ad Cap. Cong. de Officio Jud. Ord. Ordinary ad le Power de Visitation de Mero Jure Dav. Rep. p. 3.* See *Mendo de jure Acad. Ad Ordinarium spectat Universitas Causarum Calv. in v. Ord.*

what-

whatsoever, and that of himself, without any *deputation*: And therefore tho the *Nature* of the Causes, and the *procedure* upon them may be different; yet as to the *rise* and *extent* of the Power, the Jurisdiction of all Ordinaries in their respective Courts, must be the *same*, and equally *Universal*.

Now then as the *Canon* for prevention of Proxies restrains the Bishop, tho *Ordinary* to *triennial Visitation* of his *Dioceses*; so the Local Statutes for prevention of *Sportulage*, limit Visitors to a *Quinquennial Visitation* of their Colleges: And yet the Canon, and the Statutes that restrain the Solemn Visitation, bar them not in the mean time from the ordinary *Acts of Jurisdiction*. A general and chargable Enquiry *ex Officio mero* into Matters undetected is limited; but a redress of *emergent Grievances*, and the Conusance of Matters delated, as necessarily incident to his Office of *Ordinary*, neither is, nor without an apparent Failure of Justice can be *taken away*, or *restrain'd*. And therefore as in all *Dioceses*, so in all *Colleges*, where the Right of a *triennial* or *quinquennial Visitation* is lodg'd, there in the same Person, this Power of redressing Grievances in the interval, hath always been *presum'd* and *allow'd*. And as the *Practice* in all *Colleges* hath always been the same, so is the reason of it too: An *Universal Provision* for all Grievances is design'd; the Redress of them is plac'd in the Ordinaries and Visitors only; and therefore their Power doth

Visitatio intromittitur sæpius necessitate existente, uolun p. 103.

Regula que respicit Commune, & regularem visitationem, que fit etiam sine causa, non prohibet iteratam, si causa subesse. Marian. Socin. de Vis. Sec p. 241.

This Fra. de Pavinis calls *Quotidiana Visitatio*, que fit quotidie ex multis causis emergentibus. Tr. Tracl. Tom. 14.

and

and must during the *triennial Term* extend it self to any occasional Exorbitances. It is further observable, that an Ordinary is said to have an *internal Jurisdiction*, and such an one as is opposite to a foreign Authority; and therefore when Bishops visit their own Hospitals *de Jure*, they act as *Ordinaries*, but when appointed by the King, they have only a *borrow'd, foreign, and delegated Jurisdiction*. When Bishops visited their Dioceses, they were *domestick Judges*; but when *tanquam Sedis Apostolicæ delegati*, they visited Monasteries and places exempt; they had only an *extraordinary and derivative Authority*.

This is the Power of a Visitor, which may and ought to be exercis'd in those Places that are of right visitable, and therefore it is next to be remark'd, that not only Churches, but all *Free Chappels*, all *Hospitals* and *religious Houses*, as well of *Seculars* as *Regulars*, all *Universities* and *Colleges*, all *Lay-Confraternities* instituted for *charitable Designs*, and in short, all *Loca pia*, whether they be *ecclesiastical, lay, or mixt Societies*, are in both Laws, Canon and Common, subject to Visitation. And therefore if no particular Visitor be appointed by the Founder, and no other provision is by Law made for the Visitation, then the Ca-

a Coke 10. Sut. Hosp. 31. Brook Ab. 55. vid. 2. H. V. St. 1. 14 Eliz. c. 5. 13 Eliz. c. 17. Lyndw. l. 3. c. 10. 14 Eliz. c. 5. 2 Inst. p. 725. Roll's, Ab. f. 229. 8 E. III. 70. 37. Davies Proxies 23. 9 H. VI. 31. 9 Ed. IV. 24.

b See Hostiensis de Rel. Dom.

Greg. l. 5. Tit. 31. c. nimis iniqua. Quarant v. Exempt. Genuens. in prax, c. 59. Vid. Rebuff. de confra. Lup. de Xen. Summa Sylvest. in v. Hosp. § 2. n. 3. Roll's. Ab. p. 22, 230.

Vgolin. p. 103. Visitari debent ab Episcopis quæ Generalibus Capitulis non sunt subjecta.

Angel. in v. Hospit. Et hoc procedit etiam si Testator qui edificavit prohibuisset; ne Episcopus in tali negotio intramitteret. Conc. Trid. Sess. 7 c. quia Testator non potest facere, quin in leges suo Testamento locum habeant.

11 H. IV. c. 41. Ed. III. 5, 6. See Mavrad. de Jure Abbatum Præscriptio tollens visitationem non valet, quia credit in usum publicum, sed valet quæ transfert.

non and Statute supply the Omission, and entrust the *Ordinary of the Place* with this universal Jurisdiction. There is no prescription against Proxies, no more than against Tiths; the one is as incident to a Visitation as the other to Instruction; and both those are and have been esteemed of indispensable necessity. Visitation is as incident to those Societies as a *Court* to a *Manner*, and is equally of common right and of common necessity: And therefore^b it is, and was a received Rule in both Laws, that of such visitable Places and Persons none can in any place be wholly exempt, but must either be immediately *subject* to one, or *reserv'd* to another Power.

Now there are two *Methods* by which all Grievances and all Exorbitances may be brought into question before the Visitor; one is the Complaint of the Party aggriev'd; the other the *general Enquiry* of the Visitor himself into all the Offences of his Subjects: The former is by the *Prosecution* of the Party, the latter upon the *mere Office* of the *Judge*; the one of these, tending to the Redress of particular and occasional Grievances, gives foundation to an *Appeal*; the other, aiming at the Reformation of all general growing Misdemeanours and Exorbitances, affords Matter for a *Visitation*. Now tho it is certain that all Visitors are entrusted with both these Powers, as equally necessary for the preserving the College, yet is it no less evident, that both these are distinct in their *Nature and End*; and that nothing but gross Ignorance can confound them. Nothing but Complaint made to a supe-

^a *Dav. Rep. Case Proxies.*

^b *Non valet prescriptio ut ab aliquo visitari quis non possit, sed bene valet contra Episcopum quod alius Prelatus visiter.* Cald. Lond. 453.

rior *Judg* by a particular Person, in his own necessary defence for his own private Interest, and which tends not so much to the Punishment of Offenders, as to his own Relief, can produce and occasion a Commission of Appeal. But the Confession of his own Subjects, made upon Oath to a *Judg*, upon his enquiry for the Execution of Justice and which propounds not any private Amends and Satisfaction, but the publick Good, and the Safety of the Body Corporate is the ground of a *Visitation*.

Now then, since I have in short laid down the necessary Powers of a *Visitor* and an *Ordinary*; the usual Methods of their Procedure upon an Appeal, and in a *Visitation*; and lastly have shown the Nature of Places visitable; it remains as briefly to apply these certain and general Rules to the present Case in question.

The Founders of Colleges then as they design the Perpetuity of their Estate, so they equally desire the Continuance of their own Laws and local Statutes. "Their Trustees for enforcing these Orders and Constitutions are by Law their *Heirs*; and, by appointment, usually among Bishops, their *Successors*. These are, in respect of their Protection of the College, called *Patrons*; in reference to their Jurisdiction, *Visitors*. For as it is a certain Rule, That a Founder hath in him the Power of *Visitation*, so is it no less controverted, that a ^b Patron, who is *loco Fundatoris*, succeeds to those Rights, and by construction of Law, is *Visitor*. Oftentimes, as is easie to be seen in the Charter of ancient Hospitals and religious Societies; there is nothing more specifi'd than *Visi-*

a 6 H. VII. 14. *Fitz. N. Br. fol. 93. 94.*

b 8 E. III. *Aff. 29. § 250.*

tatorem relinquimus; and in others, *Patronum designamus*; and those words only by plain and necessary implication convey'd the visitatorial Jurisdiction in its full extent and latitude. The Power of receiving Appeals was so great and so necessary a part of that Authority, that tho I find in very few Statutes of Monasteries and religious Societies, that Liberty expressly given them, yet was it *presum'd*, *own'd* and *practis'd* in all. Whether the *visitatorial* Power was lodg'd in the *Ordinary* of the place, the *Principal* of the Order, the *superior Abbot*, the *Capita Ordinum*, the *Judex Academicus*, the *Conseruator Universitatis*, or lastly in the *local Visitor* of the College, it is a certain undeniable Proposition, that wherever the entire Power of *Visitor* is plac'd in one Person, there, as an *incident* to the Office, the Redress of Grievances upon Appeals was by Law vested and settled.

And therefore, tho the pretended Restrictions are as strong in almost all Colleges in the University as in *Exeter*, there is not one, at least of any standing, wherein Appeals have not constantly been made to the *Visitor*. And as Custom and common Practice have own'd the *Visitor's* Authority herein, so likewise the Courts at *Westminster* have countenanc'd and approv'd it. And therefore in *Apleford's Case*, *Mic. 22. Car. B. R.* in *Widrington's Case*, *Hill. 13. and 14. Car. II. B. R.* in *Dr. Lewis's Case*, *Provost of Oriel.* in *Parkinson's Case*, *1^{mo} W. & M. B. R.* in *Proost's Case*, *Hill. 3^o W. & M. B. R.* it is resolv'd, That the proper Remedy of all expell'd or injur'd Heads Fellows or Members of Colleges, lies in an Appeal to the *local Visitor* only, and that they are conclud-

e See *Whitlock's Read. Div. 3. Point 9.*

See *Patrick's Case*, *Hill. 18, 19. Car. II. B. R.*

ed by this determination. " If there be a Jurisdiction in
 " the *Visitor*, saith my Lord C. J. *Hales*, and he hath de-
 " termin'd the Matter, how will you get over that Sentence?
 " and thereupon a *Mandamus* was deny'd. But if a Fellow
 had no *Visitor* to whom he might appeal, as in *Herns Case*,
 the *Mandamus* was granted and adjudg'd good. Since there-
 fore in all other Societies and Monasteries an Appeal to the *Vi-*
ditor hath been granted, since in all Colleges it hath been us'd
 and allow'd, and since as in all foreign Courts, so especially in
 those of *Westminster* it hath been unquestionably admitted, no-
 thing needs further to be added to the Confirmation of it, than
 that in *Exet. Coll.* the Statutes do more plainly cast that Power
 upon the *Visitor*, than in most other Colleges of the University.

The Statute *De Visit.* says, *Adeo prout & ad malum pro-*
clive est humanum genus, & uti quotidie videmus, varietas tem-
porum optima quæque aufert, & mutat, ut non sit in nostrâ po-
testate eas condere Leges & Statuta quæ non violet aliquan-
do astutus, & versipellis, aut malè interpretando aut aliquid
fraudis ingerendo aut excogitando modum quo nodum quamvis
Herculeum dissolvat.

Distinctions, he was sensible, were to be found out; the
 Statute might easily be eluded; *Bribery* might be construed
Repairs; *Promotionis causa* might be interpreted a *Benefice*,
 and therefore against all these Evils he provides a *Visitor*, un-
 happily not foreseeing, that even this Remedy it self might
malè interpretando be distinguish'd into nothing.

Nos eam ob causam, ea quæ duximus nostro tempore utilia &
commoda, inferentes quòd ea conservanda rectèque interpretanda
attinet, confidimus auctoritati & benignitati Episcoporum Exoni-
ensium Successorum nostrorum, quos dicti Coll. Patronos & Visi-
tatores

tatores relinquimus, ut illi ~~qui~~ ex sua liberalitate & mera benignitate adducti ac fervidâ charitate in fidem Christianam inflammati, ad hoc Alvearium conservandum invigilent, ut Statuta & Ordinationes dicti Collegii firmiter observentur, virtutes & disciplina nutriantur possessiones & bona spiritualia & temporalia prospero statu floreant, jura, libertates & privilegia defendantur & protegantur.

Now I would willingly know, whether relinquimus Patronos, & Visitatores, be operative Words or not; whether confidimus autoritati & benignitati Episcoporum Exoniensium ut ad hoc Alvearium conservandum invigilent ut Statuta & Ordinationes dicti Collegii firmiter observentur, &c. are fit for an universal provision; and do consequently lodge in the Visitors thereof an *Universal Jurisdiction*? whether it is possible to defend Possessiones & bona spiritualia & temporalia by a Visitation once in Five Years, which may be dilapidated in less than one; whether it will be easie *protegere Jura & Libertates* of the Members thereof, by restoring them Five Years after Expulsion? Could there be more expressive, plain and extensive Words found out for the Settlement of the Visitation Power? and can it afterwards be thought that the Founder design'd to expose his College and the Members thereof to all growing Evils, to all occasional Grievances, and emergent Exorbitances and Combinations?

It is plain then that the Founder repos'd the whole Trust and Care of the College in the B. of Exeter his Successor; and to that end constituted him *Ordinary Visitor*, and Patron thereof, in so general and expressive Words, that in all the Appointments of the *Visitors*, either of Hospitals or of Monasteries, or of Colleges; I never saw, and believe there is not, any one Instance wherein larger Powers were granted to a Man, and where-

where the Grant was ever made with more Solemnity : And therefore, if this Power (which is an impossible Supposal) ; but if it should fail in its bottom, I dare, upon enquiry, affirm, that *no visitatorial Jurisdiction of Churches, Hospitals and Chappels*, can upon more expressive Words be maintain'd and supported, and that all the provisionary Constitutions of those Societies were vain and idle Appointments. For if Founders do adjure, and in *Visceribus Jesu Christi* beseech their Successors ; *ut fervidâ Charitate in fidem Christianam inflammati*, they should expell all Heresie from their Society ; and if afterwards their Saviour in this very College should be expos'd as a *Galilean Vagabond*, and a *Crucifi'd Vagabond*, and if all the Fundamentals and Articles of Faith should be therein ridicul'd to the known disturbance and abhorrence of the whole University in a most solemn manner declar'd ; and if, lastly, it is impossible for the sole Visitor of that College to give any redress herein, or to allow any less scope to the Rector for Libelling his Saviour here then a *Quinquennium* ; then it must be allow'd, I suppose, that these Rules and Orders were inconsistent and null, and the well meant Dreams of their *Religious Founders* ; But if an Universality of Jurisdiction, as plainly it is, be lodg'd in the Bishop, and may upon such Emergencies be exerted, then is the Founder consistent with himself, then his plain Words will have their due Force ; And the College according to his appointment may be govern'd and preserv'd.

I shall insist now on no more than one other Branch of the Statute. *Quos quidem Rectorem Subrectorem, & Electos, ac præterea Ministros quoscunq; & Famulos, prædicto Domino*

mino Episcopo, & suo Commissario, sed nulli alii, volumus & precipimus effectualiter intendere & parere.

As before, the Bishop was appointed Visitor; so here all others are barr'd from any Partnership in the Authority: The Powers that were given him are *intire*, and *undivided*; and all the Controversies are taken away, that usually arise from *concurrent* and *interfering* Jurisdictions.

Now since by exprefs Words so large Authority is plainly lodg'd in the Bishop of *Exeter*; let us consider what is offer'd to divest him of this Power.

1. A Fellow hath sworn not to commence a Suit against the College, and hath renounc'd the Right of Appealing.

Omni Actioni contra Rectorem, &c. quomodolibet appellationi & querelæ in ea parte faciendis & quarumcunq; literarum impetrationi, precibus principum, prelatorum, &c. quibus possem adjus, titulum & possessionem vendicandam reconciliari, ac quibuslibet juris vel facti remediis, per quæ me petere possem in integrum restitui, quantumcunq; aliàs mihi probitatis & vitæ merita suffragantur in vim pacti renuncio.

Now if in this Oath it should be admitted that the general Words should include the *Visitor*, as they plainly do not; yet nevertheless how can any Judge be sworn out of his Authority by a Fellow? If he had not Power of receiving Appeals before, The Oath under this Interpretation would be *vain*; and if he had, the Oath, in regard of the Visitor would be *void* and *ineffectual*. If all the Tenants of a Mannor should swear not to attend the Court, the Oath would not only be *illegal* in respect of the Tenants, but *vain* in reference to the Lord.

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The Oath is not design'd to take away *Jurisdiction* from the Judge ; but to take away some *Liberty* from the Fellows; If Men should upon Oath submit to Referees or Arbitrators, the Power of the Courts would not be diminish'd, but the Right of the Subjects restrain'd; for it is a vain and senseless conceit, that if my Authority, of what Nature soever, whether from King or Subject be legally vested in me, any Man by *his* Oath can swear away my *Jurisdiction*.

2. This Opinion as absurd as it now seems, is more so, if as really, there is not, ~~no~~ there be no such Oath at all : A Fellow renounces indeed Appeals in General, and those Words of Latitude are put into a certain and determinate Signification.

Now the *Visitor* cannot come under those Words, however large and extensive ; the *Visitor* hath a domestick and internal *Forum*; and whereas a Complaint to him is an application to an *ordinary* Judge ; An Appeal in propriety of Speech is a recourse to a *forreign* or *superior* and *extraordinary* Jurisdiction : In all Abbies, and in all Colleges, in all Instances of Canon and Common Law, these general Words excluded any other Authority, except that of the *Visitor* ; but did secure and strengthen his Jurisdiction. And therefore when the Statutes of *Exeter* College were made, the Founders well knew the Power of the *Visitor* as settled by Law ; they knew the Practice of all Colleges, from whence these Statutes were transcrib'd ; and therefore if they had design'd to put any *new* Limitations to the *Visitors* Authority ; it is impossible to think but they would have found out *new* Words to express their Intention.

Then

These Statutes, however ancient the College is, are of a late date; the Usage of all other Colleges was then known and fixt, and therefore if any more than the customary Renunciation had been design'd, the usual Oath would never have been borrow'd and impos'd. All Letters of great Men are renounc'd; all forreign and vexatious Suits are forbidden, and would it not have been as easie (since he descended to particulars) to bestow one word upon the *Visitor*, and at least by *Name* to exclude him? The Absurdity of that Opinion, if it needs be further demonstrated, appears most visibly in this following Instance: The *Rector* is by Oath barr'd as much from all these *juris & facti remediis per quæ possit in integrum restitui*, and renounces them in *vin pacti*, as well as the Fellows; and yet in the Statute he is expressly allow'd to appeal to the *Visitor*. Now would a *Founder* give a Man a Liberty by Statute, which he takes away by *Oath*? Would he settle a Right in the *Rector* in one Statute, and oblige him to swear himself out of it in another? It is clear then, that the *Visitor* was not within the purview of that *Oath*, and that the *Rector* would have been guilty of no *Perjury* for appealing to him. But I leave it to his *Polonian Casuists* to distinguish him out of it upon his farther *Appeal*.

If then the *Visitor* hath general Powers vested in him by Law and by Statute; if he is the *Conservator* of the College; and as in their *Acts* he is formerly call'd *Patronus*, and *Supremus Judex* therein; if he can redress all Grievances, and hath consequently the Power of Receiving Appeals; it is not possible that a *Fellow's Oath*, tho it should have particularly nam'd him, can devest him of that Au-

D

thority;

thority; and if such Oath doth *not* particularly name him, nor by Comparison with other Statutes, was intended to exclude his Jurisdiction, it is certain that the Authority remains *entire*; and, that in the same manner as Appeals lay to him before the Oath, they must be admitted to lie after it.

2. The second Exception to this Universal Authority is drawn from the Words of the Statute *de Vis.*

Eâ de Causâ liceat Domino Episcopo Exon, qui pro tempore fuerit, & nulli alii, nec aliis, quoties per Rectorem dicti Coll. & in ejus absentia Subrectorem, & quatuor alios ad minus, ex septem maximè Senioribus Scholaribus fuerit requisitus; Nec non absque requisitione ulla de quinquennio in quinquennium semel ad dictum Coll. per se, vel per suum Commissarium, quem duxerit, deputandum liberè accedere. Cui quidem Reverend. Patri, ac Deputato suo (præterea nemini) tanquam Patrono & Ordinario Visitatori, vigore præsentis statuti plenam concedimus potestatem, ut super omnibus & singulis particulis & articulis, in dictis Statutis contentis, ac de quibuscunque aliis Articulis statum, commodum, aut honorem dicti Coll. concernentibus aut quæ in dicto Coll. aut aliqua illius Persona fuerint reformanda, aut corrigenda, Rectorem, Scholares, & Electos interroget, & inquiret, cogâtque eorum unumquenque in Virtute Juramenti, & per censuras si opus fuerit ad dicendum veritatem de præmissis omnibus singulis, &c.

It hath been before prov'd, that *two* Powers are necessarily lodg'd in a Visitour; one is the ordinary jurisdiction, which exerts it self upon the injury and complaint of any of his Subjects; and redresses their grievances: The other is an extraordinary and general enquiry made by the Judge himself

himself *ex officio* without the instance of the Party. Now this Statute doth not only vest him by the former general words with the *ordinary* powers necessarily incident to a Visitor's Office : But goes on likewise to *ascertain* here his *extraordinary* Authority and to fix the *bounds* of it. This *Visitation* is general as well in respect of *Crimes* as *Persons* within the Judges territory and compass ; and is sometimes *necessary* and therefore *not omitted* ; but withal troublesome and *chargeable*, and therefore *restrain'd*. In this general enquiry *by Office* which is by the Canonists call'd *Officium merum* the powers of the Judge are much larger than upon an *Appeal* ; the method of the procedure different, and the occasion of it are of as great, yet usually not of so urgent and pressing necessity. And therefore since his Powers are *great* ; the solemnity of the Process extraordinary ; and the *Sportulage* which is always incident to it, not small ; it was prudence in the Founder to allow the use of *ordinary* Jurisdiction *always* ; and by that means to prevent the necessity, as well as to restrain the exercise of his *extraordinary* Authority. And herein the care of the Founder was agreeable to that of the Church, for no *Canons* ever set bounds to any other than gainful Visitations, nor ever thought fit to limit the Duty, but where it was recommended by Proxies.

As this Jurisdiction then is set up by Statute ; so another, in Case of great emergencies is likewise plac'd in the Visitor ; which is a *Visitation upon requisition*. This is a mixt Office ; and differs from a *Visitation* because it is granted upon *denunciation* and *presentment*, and upon the instance of the party ; and yet at the same time agrees not with *Appeal* ; because it proceeds by Enquiry and tends not to the *redress* of a

private grievance, but the *regulation* of some publick enormity.

This Branch of the Statute therefore, however it may limit a *Visitation*, is so far from restraining *Appeals*, that it enforces them; for where-ever the extraordinary *Remedies* are limited, there is more occasion for, and more Latitude to be given to, the *Ordinary Jurisdiction*. This is the plain and natural intendment of the Statute; this is that *Universal Provision* which the *Founder* design'd, which the *College* need, and which the *Visitatorial Power* was brought in to supply. Upon this short view of the Office of *Visitor* in general, and upon this enquiry into the Statutes of *Exeter College*, in particular, it may be safely affirm'd.

1. That all sole Visitors separately, and all Visitors ordinary, and extraordinary jointly, have as an incident to their Office, the Power of receiving Appeals.
2. That this Power, as in all Churches, Monasteries and Hospitals, so in all Colleges hath by the respective Visitors thereof, been us'd and exercis'd, and in all Courts been confirm'd and allow'd.
3. That the Local Statutes of Exeter College do in the same, and no other manner, then as the Canons and as the Statutes of most other Colleges, limit and restrain the solemn, extraordinary, and chargeable Visitations; but at the same time do vest the Visitor of the College, with all ordinary Jurisdiction in its full extent and latitude.
4. That the Statutes of Exeter College are so far from precluding Appeals to the Visitor, that they expressly warrant them, and that the Oaths of the Rector and Fellows
neither

neither can, nor by the plain and natural sense of the Words, are intended to restrain this Authority.

If then the *Visitor* hath power of receiving Appeals, *Dr. Masters* Commission is good, *Dr. Bury* rightly as well as *justly* expell'd, and the whole *Process* legal and unquestionable. * It is not necessary therefore to add what yet hath been apparently prov'd, and will more fully be clear'd, that if the Bishop had no Power of receiving Appeals, and consequently the Commission was void, and the Acts of it null and *inauthoritative*, yet however the *Visitation* could not thereby be barr'd, nor the Bishops Right be taken away, nor the Expulsion defeated.

The Point being thus settled, it will be an easier Matter to consider those little Objections, which have been started by the Author of the *Case*, and have not yet been refuted by *Mr. Colmer*. Some things there are in the *Account*, which he says he does not *understand*, and perhaps it may be no easie Matter for me to bring down my Expressions to his *Understanding*; or his *Understanding* up to them: Other Passages there are that in his Opinion need no Answer, and they therefore stand in the same Condition they were, and want no Defence: But as to the Exceptions taken, they shall have Answers that are very short; and yet as I suppose, full, and no otherwise tedious, then because superfluous and unnecessary.

After the History of *Mr. Colmers* Incontinence, which has been prov'd to be False and Immaterial; the first *Proposition* laid down is, That an Appeal to the *Visitour* is by

* See the *Account of the Proceedings*, &c. P. 26, 27.

Oaths restrain'd; and then he gives you a Comment on the reasons of that Restraint.

For when he hath put strange Orders on the Founder, which he never made: then he gives the Grounds, which induc'd the Founder to the making of those Orders.

The Ground then, that is reasonably supposed to perswade him to this *Policy*, was the Peace and Quiet of the House: And,

Were not all other *Societies* of *Students* as much design'd for Peace and Quietness as *Exeter College*? Had not *Monasteries* Free-Chappels, and Religious Societies as little occasion for Disturbances and Quarrels as Colleges? And were not their Founders weak Men to bring them into Noise, Feuds and Dissensions, when they appointed a Visitour, and gave him due Power of redressing their Grievances, and of deciding their Controversies? Would there not be much more Peace in a Diocess, if the Clergy were not subject to Visitation? And if a Parson, whose Study and Profession entitle him to Quiet, might not be cited from his Home, and subjected to the Complaint of every vexatious Person only for *Heresie*, *Bribery*, and *Incontinency*? What Confusion and Disturbances the Statute of *Hen. 5.* occasioned in *England*, when it subjected Hospitals to Visitation, whose Members before, were *without any noise* robb'd and despoil'd, and whose Revenues had been very quietly lost, and dilapidated? In short, the taking away of *Westminster-Hall* would be an effective Remedy against Champerty and Maintenance, and troublefom Law-Suits and Contention would quickly cease, if we would remove the Courts, in which they are to be ended.

But

But now for once I would desire him to make as many *reasonable Supposals*, as he will for the late Rector, and such Fellows of *Exeter College* as imploy'd him; but as few as possible for the Founders, who neither need nor desire his assistance. The Founders were Wise-Men, *Stapuldon* was a learned Bishop: Sir *William Petre* a prudent Statesman, and therefore such *reasonable Supposals*, tho of a Piece with the rest of the Book, are ill suited to the Character of the *Persons introduc'd*. All the Peace and Quiet which the College can aim at, or hope for, is promoted by the Office of a *Visitor*, and their particular Happiness consists in having their Controversies decided in a *private and domestic* Court. And tho the Censures of a *Visitor* may be troublesome to those Persons that deserve them; and a review of the Cause try'd is not very acceptable to some Judges; yet certain it is, that nothing is more requisite than the *Visitatorial Power*, for the due government of the *Society*, for the prevention of Grievances, and Exorbitances; for the speedy determination of Controversies; and for the settlement of Peace and Quietness in the College. Especially since, if there be no *Visitor* that can give redress to a Fellow unjustly expell'd; It is plain that a *Mandamus* would lie for him, as well as for a *Parish Clark*; and that this admirable Method of producing Peace and Quiet, would draw the Cause from the *Visitor* into *Westminster-Hall*.

The next thing that he leaves me to explain, is an Oath, being accessory to a Statute: Where-ever an Oath is relative to the Law, and the Sense of one depends on the meaning of the other, and the Obligation of one, relies on the continuance of the other, here it is accessory to it.

Now

Now then, *Si continget me per Rectorem aut in hujusmodi interesse habentes corrigi, puniri, aut à dicti Coll. sustentatione ejici & expelli, excludi, privari vel amoveri propter mea forsan demerita, ipsum Rectorem, seu alias Personas, seu eorum aliquem, &c. quantumcunq; alias mihi probitatis & vitæ merita suffragentur.*

In this Case therefore the *demerita* are (as is elsewhere explain'd) *Causæ in Statutis contentæ*: The *interesse habentes* are such as are appointed by Statute; and since it is impossible to know the extent of the Oath without recourse to the Statute: The Oath is accessory to it, and guided by it.

And if the Statutes are alter'd by legal Authority: The matter of the Oath is likewise chang'd, not the obligation; and the Oath, as strongly obliges to the performance of the new Law, as once of the old.

2. He proves that *legitimè convictus* doth not mean a conviction according to the *Law of England*. For it is plain to him that the *Rectour* of the College cannot impanel a Jury; nor administer an Oath. This is the *Phantom* that he railes; and, being his own, it is easily refuted even by himself: For no Man else was so absurd as to imagine, That when the Founder had in every thing else pursued the Terms and Rules of *Canon Law*, he would have borrowed the proof only of a charge from the *Common*: But if *legitima convictio* doth not amount to a conviction by a Jury; must it mean nothing, or must it signifie a conviction *without*, or *against* Law? for if it doth not, it will not justify Mr. Colmer's Expulsion.

Legitima convictio is such a conviction as the Statutes direct; and where the Statutes are silent, is such a conviction, as the
Law

Law require, in conformity to which these Statutes are made. The method of the Conviction in divers Laws is very often different ; but it is always grounded on a *crime*, and no crime can be applied to a person but by proof. In common Law a Verdict is founded upon evidence ; and is presumed to be made in pursuance of it ; In Canon law, where Trials are made by Witnesses, not by Jury, nothing but the confession of the Parties, the Testimony of two witnesses, or the *Notoriety of the Fact* can make a *Conviction*. And therefore as in one the Sentence of a Judge cannot convict any man, when supported by no verdict ; so in the other it is equally void, when founded on no evidence. A man cannot renounce his Right to legal Proceedings ; If he should agree to be sentenced uncited and unheard, and to be convicted without proofs ; it is a void Agreement, and so utterly null and illegal ; that the *vis pacti* cannot support it : *Sententia nulla potest partium consensu ut valeat, non tanquam sententia sed tanquam contractus : Cald. Cons. 138.*

The Fellows of *Exeter* might be convicted of Incontinence, as the Statutes of other Colleges direct *per idoneos testes, & facti evidentiam* ; or as Clerks are to be convicted of it, according to such lawful proofs as are requisite by the law of the Church : 1 H. 7. c. 4. The Rector, if he cannot administer an Oath, might have used the assistance of the *Vice-Chancellors* or of the Visitors Jurisdiction. Homicide is in the Ecclesiastical Court a cause of *Deprivation* ; and yet it cannot originally be examined there : Their Sentence must be built on a Conviction at Common law : and as the Spiritual Judges even to Ecclesiastical purposes cannot convict Men of such crime by Ecclesiastical Proofs ; so much less can they declare men convicted without any. *Hob. 122. Searls Case. Cr. 2. Hob. 194.* A competent Judge then is not more required, than *Legal Testimonie* ; *Summarie de plano & extra strepitum Judiciale* may take away the formality of the Process, but never the necessity of Evidence ; The noise of an Oath is not great ; nor the length of it tedious ; It is the direct and plain way of Procedure ; and all Presumptions, strained Inferences, and traditional Reports occasion the length and circuit of a Tryal.

Legitimè is expounded in the Probationers Oath *secundum exigentiam Statutorum*, and so *Canonice* is interpreted *secundum*

ann. exigentium Canonum. Lindw. 5. Tit. de Purg. Canon.

3. *Si propter mea demerita contingat me deprivari* is in some statutes of other Colleges explained *propter mea demerita, aut causas in statutis contentas*, in others *propter malos mores, aut mea demerita*. Now this Gentleman's interpretation of *ob mea demerita* is whether a man be guilty or no, which then should have been thus expressed *ob mea forsan non demerita*. And if *non* added to this and most of his affirmations, it would much ease the Book of many falshoods, and make it in many other instances, true sence, *is in this good Grammar*: But the following words put the sence of it out of doubt, *quamvis alias mihi probitatis & vite merita suffragentur*: Which imply a Man criminal in *this*, and irrepoveable in *all other* concerns. The Oath was designed to oblige the Conscience; if the Crime was true, Acquiescence was enjoined; if it was false, no just remedy was precluded. And whether the charge were true or false, his Conscience is judge; and his Oath enforces the Conscience to a right judgment.

If then an innocent man had liberty of Appeal; whoever doth not appeal confesses, and owns his guilt. *Non appellans dicitur approbare sententiam latam* Card. Tusc. con. 388.

5. My 4th. reason was this. "That it is the plain design of "this Oath to secure the College from any *Action at Law*, or "any other disturbance *from abroad*; and that in the recital of "the different appeals, and remedies, which are there prohibi- "ted, that of *appeal to the Visitor*, which was most obvious to "to be thought on, is not *expressly* mentioned nor forbidden: "And therefore that those general words may in an equitable "sence be intended to restrain the Party from all Appeals to an "Extraneous, not to a Domestic Court; to one that is a Foreign "Judge, not to a Visitor, who is a part and the first member of the College.

Nothing in the answer deserves to be considered; but the domestic Jurisdiction of a Visitor; if the Founder referred all *jurgia ira & rixa* to the final arbitration of the Rector, Subrector and three Seniors; The Jurisdiction of those persons thereby gained in respect of the Visitor was *cumulative*, not *privative*. And therefore when

a man is forbidden, as in this case, to prosecute another *coram aliquo Judice extrinseco Ecclesiastico vel Seculari*; the intent of the *Founder* plainly appears to bar any action in the *spiritual* and *temporal* Court; and to refer the contending Parties to the Arbitrators there mentioned or at farthest to no other than some *intrinsic Judge*. And it is observable that these little Controversies were not to be *Judicially* ended by these Persons; but *aliquâ ordinatione bonâ & concordia per personas prædictas* (as *Referees* and *Arbitrators*,) *terminentur & finiantur*: so that here an amicable reference is advised and *enjoyed*; but still upon a farther disagreement, if it could not take effect every Action *coram aliquo Judice extrinseco* was *expressly* forbidden; but not a recourse to a *Visitor* disallowed.

The Argument concerning *John a Stiles*, and the *6th. Commandment* needs no grave answer; and I have at present neither will nor leisure to expose it.

6. Arbitrary power is power against law: And the unstatutable Expulsion of a Fellow; and the denial of a lawfull Appeal are illegal and arbitrary Acts: what obligations the *Founder* might have enjoyed we dispute not; but we have proved, that none are laid: The *Visitors* Authority is not created by the local Statutes, but cast upon him by law; The Power of a *Visitour* depends not on the *Founder*, but the Right of the Bishop of *Exeter* to that power is derived from him: The Kings Courts have a more large Jurisdiction than the *Visitor*; but not more certain. And therefore no mans Oath can bar the Power of the one, nor of the other; especially since it appears, that it was not designed to preclude them.

Thus hath it once more been proved; That the Oath is necessary to the Statute, that no innocent Man is barr'd from *Appeal*; that legal Proofs are necessary to a legal Conviction, that the *Visitor* is a *Domestick Judge*, and that *appeals* to him from an innocent person, illegally expelled, are not more warranted by Reason, than by Statute.

Next, the *Case* examines the reasons that proved the *Visitors* Authority of receiving *Appeals*.

P. 36. It is owned; That there are no other Judges of *Appeal* except the *Visitor*; but it is doubted whether there are any Judges of them at all. An *Appeal* is a natural Defence which cannot

be taken away by any Prince or Power ; much less by any other than by the supreme Magistrate and not justly by him. And therefore it is not easy to conceive, especially if we read his words, that a *private Founder* ever designed to preclude it. For since *Appellatione remota* is never mentioned in the Statutes but once, and since then it expressly bars an *Appeal* from the *Visitor* not to him ; no part of the Statutes can be urged against the *Visitors* authority, but the Oath of the Fellows. That Oath hath been already proved to bar no *Appeal* to the *Visitor* ; and the rather is not capable of that sense ; because all Statutes that take away *Appeals* are *odiosa*, and therefore in doubtful cases are limited and restrained ; and all renunciations of right must and ought to be construed in *favorem renunciantis*.

If then a *Visitor* had power of receiving *Appeals*, if in this College all other *Judges* but the Bishop of *Exeter* are expressly excluded ; if the Oath doth not take away the Fellow's right, much less the Bishops Jurisdiction ; then it follows, that the Bishop had a Right of receiving *Appeals* ; incident to the Office of a *Visitor*, and yet distinct from his Right of a *General Visitation*.

2. " To dream of universality of Jurisdiction from a sound of " a word *Ordinarius* is a conceit that needs no more refutation, " than the mentioning of it. And to dream of the visitation in five years from the sound of the word *Quinquennium* is equally as senseless, and ridiculous. The import and meaning of both words is fixt and known, and the one is not, as I think more *sound*ing than the other. The only difference is, that the latter by chance fell within his reach, and the former is undoubtedly above it. Usually legal Controversies depend on the doubtful meaning of Terms ; The case is altered by the extent, or restriction of a word : and therefore it was *once* a frequent observation in the Law books ; That the true knowledge of terms is the most necessary and most difficult part of that Study. What *ordinarius* signifies ; I have before explained, and any judicious man, that reads those great and express authorities will ; choose rather to *dream* with those Authors than to *think* with this Gentleman.

3. The little Objections that follow are already anticipated and

prevented; only one thing I must observe, that the *operative* and *effective* words of the Statute are here stiled the Preamble of it: the Statute it self, as before printed and explained, sufficiently shows the weakness of the Assertion; and all the long Harangue founded on that bottom, is a gross continued mistake, made acceptable however to some Palates, by much scurrility, and no wit.

Men that have no Reputation themselves, may fall upon their Betters without danger; and the return of the Compliment is as prejudicial to the Person affronted, as the abuse it self, because it implies an equality. Libels that have shewn the Malice, have sometimes recommended the Wit of the Adversary; but blunt downright Rudeness is always the joynt product of ill nature and stupidity: however it is not improper that the late *Rectors* Cause should be defended with the *same* decency, with which it was managed, and that the Advocate should at once shew himself Master as well of the Sence as of the good Breeding of his Client.

The Appointment of the *Founder* created him *Visitor*, but the Law ascertain'd and fix'd the Rights of his Office. A *College* and an *Hospital* is as much *visitable* in Law as a *Church*. And the same right that of necessity belongs to the *Visitor* of a *Diocese*, must of Law belong to the *Visitor* of a *College*: The Precincts may be more narrow, but the Jurisdiction is as large; the Subjects may be fewer, but the Powers are as many. The *Ordinary* Acts of Visitation therefore remain equally in both, since (as hath been already prov'd,) the Bounds that are set, reach only to the *extraordinary* Acts of their Power, and their solemn Visitations.

It being evident then that both these Powers, both of *receiving Appeals*, and of a *General Visitation*, tho they are both equally lodg'd in the *Visitor*, yet are both *entire* and *distinct* from each other in their nature; it will be easie to prove that the *exercise* of one cannot bar the Bishop from the *right* to the other: This task is still the less difficult, because the reasons in the Account for it are such, as the *Case* hath not yet pretended to answer.

I. The Bishop of *Exeter* then hath no power but as *Visitor*, but other Powers belong to the *Visitor* than that of a *Visitation*: A distinct Authority of a *general enquiry* is given to him, and if a *Commission* of *Appeal* amounts not to this Power, it cannot determine it. An *Appeal* is private in its end, and restrain'd in its extent: A *Visitation* is

is of a publick nature, and general in its designs as well as powers : Both indeed may in their own nature be Criminal, but the one is prosecuted *Civiliter*, the other *Criminaliter* ; the one tends to the redress of a *Grievance*, the other to the punishment of a *Crime*. 'Tis said indeed in the *Case*, that *omne majus continet in se minus* ; and that if it makes out any thing, must prove, that whoever hath right of *Visitation*, hath power of receiving *Appeals*. But such a Maxim as *Omne minus continet in se majus*, can only convince us, that a *Commission of Appeal* contains a *Visitation*.

2. The Commission by which Dr. Master acted, was founded on that part of the Statute, by which the Bishop is appointed and constituted *Visitor in General* ; not that which gives him power of a *Quinquennial Visitation*. He has no other claim to this Authority, then as *Visitor* ; and therefore in his Commission, he sets forth his own Title, and withal the ground of his Power. If any redundant words were there, they could do no harm, and therefore are weakly excepted against. But as it happens, those only are used, that are sufficient to support the delegated Jurisdiction.

3. The Nature of a Commission appears not from the *Stile* or *Title* of the Judge, but from the extent or restraint of the Powers that are granted. The being of a Court can be no other than such as is warranted by a Commission on which it depends : This was wholly restrained to the Cause of *Appeal*, and the *Commissary* exactly observ'd the restrictions. In a *Visitation*, all the Fellows must necessarily have been cited, and appeared ; but none were call'd to this Court, but those that had been partakers of the Personal wrong, and were oblig'd to answer the charge of Mr. Colmar against them.

4. The Definition of a *Visitation* then is weakly applied to the Commission of *Appeal* ; the nature of *Visitation* hath been prov'd to be a voluntary enquiry into matters *Criminal*, and *Correction* thereupon, and to be general likewise, both as to *Crimes* and *Persons*. Now how was this a voluntary enquiry, that was made not by the Judge himself *ex Officio*, but at the instance of Mr. Colmar ? How was it general, that took Consuance only of this Crime, and of no other Persons than of such as were concern'd in it ?

Nor lastly, can it be properly said to be an Enquiry into matters *Criminal*, which only examined a Crime upon the instance of

of a Party, in order to his *private* amends and satisfaction. Since therefore the Commission was *special*, and restrain'd *ad negotium appellationis* only, since the *Acta Curie*, which are here annex'd, were in pursuance of that Authority, and exceeded not those restrictions: Since the right of *receiving Appeals* is wholly different from that of a *Visitation*, the Powers much *less*, the Extent and Process more *confined*; it is impossible that this Act can amount to a *Visitation*, or that the exercise of *one* Authority, can determine the Bishops *right* to the *other*.

The ground I believe of this *Authors* mistake was this, that wherever a Person hath any right of doing any Act, Act of the same nature shall without the special Declaration of the Party, by intendment of Law, in his favour, be presum'd to be Authoritative and Legal. This Rule, as it holds not in this Case, because *both* Powers were lodg'd in the *Visitor*, so neither, upon the *supposed* failure of *one* of those Jurisdictions, could it reach it: For those Acts must be of the *same* nature, and from the near *affinity* between them and the *equality* of the extent, one is said to amount to the other. Besides that Rule takes in only those Acts which are *undetermin'd* by the Party, and therefore liable to the construction of Law: Wherever Words are *plain* and *express*, there is no room for *implication*, and an intendment may be presumed *without* the Declaration of the Parties, but not *against* it. 1 Just. 245. c. 1. Instit. 49. b. Perk. fol. 55 and 56. 40. Ed. 3. 5. *Intentio mea nomen imponit operi meo*. Hob. Pitts v. James p. 123. Now in this Case therefore, not only the *Commission* shew'd the special intent of the Party; but the *Commissary* himself openly declar'd, That he did not then come upon a *Visitation*, and therefore *refus'd* the *sportulage* in that case appointed by the *Founder*. Intendments therefore and Implications are at an end, and the *Commission* it self, if it should be void, would have been a *null* and *inauthoritative* act, and not a *Visitation*.

The main point being thus settled, I shall further examine what is *material* in the Case, thinking it more worth while to *refute* the *Arguments*, than, as I easily might, to *expose* the *Author*. All that is afterwards Considerable, falls under these Heads.

1. That by Censures in the Statute, *Ecclesiastical* Censures are not meant.

2. That

2. That the Right Reverend the Visitor, for inflicting of Ecclesiastical Censures, is guilty of a *Premunire*.

3. That Dr. *Herr*'s Place was not void by Statute.

4. That the Visitor had no Power by Statute of suspending the Fellows *ab Officio*.

5. That the Visitor ought not to have been Judge in his own Cause, nor to have pronounc'd for his own Jurisdiction.

6. That the Concurrence of the Fellows to the Rectors Expulsion was not Statutable. And

Lastly, That *Contumacy* is no Statutable cause of Expulsion; and if it were, ought in the case of the Fellows as well as the Rector to receive the same Punishment from the Visitor.

1. As to the Censures.

The Statute says, *Visitor cogat eorum unumquemque in virtute juramenti & per Censuras si opus fuerit ad dicendam veritatem de premissis*. As for *Censura* then this Author turn'd his Dictionary, and found that sometimes it signified a *reprehension*. As tho any term used in Law had not a primitive sense and meaning, and was not afterwards as all words of Art in their respective profession limited and restrained only to the borrowed signification. Any Man that knows the constant custom of enforcing Men to testify the truth *per juramentum & censuras* the usual *Compulsories* in all Ecclesiastical Courts, will smile at any other interpretation. See *Reg. br. orig. fol. 36.6. tit. Prob. Card. Tuf. Con. 189. Scard. fol. 450.* That I may not trouble the Reader with Instances, I will only observe, that in Acts of Parliament frequently, and in rules of Canon Law always, and in Statutes of Colledges, which were made in pursuance of the Canons, constantly, *Censures* do and must mean no more than the Three famous and well known Ecclesiastical Censures. And I refer this Rule more particularly to this Gentleman's Interpretation, *Judex Accademiarum solet ferre censuras etiam in Laicos studiosos, & in causis temporalibus, unde studiorum gratia non est prohibitum Judici Academiæ, ut sua etiam Jurisdictione Ecclesiasticâ utatur, quò efficacius secularem exerceat? Mendo de jure Acad. p. 252.* What do Censures mean there, a Rebuke, or a Reprehension, or a Sentence in the Star chamber? or have they a relation to the old Roman Censures? If this be design'd for Wit, it is not very agreeable; but if it be Ignorance, as I suppose, it is extremely gross.

Bonacina

Bonacina Tom. 1. *Disp.* 2. *de Excom.* talks of *Censura quibus superiores* (speaking of *Visitors*) *precipiunt sibi aliquid revelari*. D'Avila *de Cens. Eccl. C. 3. D. 1. Visitatores bene possunt relinquere Ordinationes in scriptis cum pœna Excommunicationis*; and so *Visitatores Religionum* (of all religious Houses) *possunt relinquere Ordinationes in Scriptis cum pœna Excommunicationis*.

How far therefore the *Founder* could vest the *Visitor* with this Authority, and how far the Law will warrant it, is matter of another dispute: But that *Visitors* have in like Cases used *Ecclesiastical Censures*, even in Societies not merely *Ecclesiastical* and that the *Founder* design'd by these Words to give that Power, and esteem'd it necessary for the *Visitor*, is and will be prov'd beyond Contradiction.

2. As to the *Premunire*. If this Authour had given the Reason upon which the learned Judges granted a *Prohibition* in his Case, the force of their Argument and the Authority of the Persons would justly have commanded an entire Submission and Acquiescence; at least nothing further would have been mov'd than that upon the Prayer of a *Consultation*, their Lordships would be pleas'd, according to their Wisdom, finally to settle and determine the Cause. But now, since he hath been pleas'd to impose his own Opinions upon the World, and with equal Insolence and Ignorance to pass Sentence upon the Bishop himself, and to pronounce him guilty of a *Premunire*: it is not to be expected, that the deference should be paid to his weak *Argument*, which undoubtedly would have been due to his *Report*. The Discourse that he there gives is well proportion'd to the Capacity and the Breeding of his Client; and if the Cause be good in it self, it is there put in so ill a Light, and justify'd upon so mistaken Grounds, that a bad one could not have a worse Face, nor be more weakly defended. Since therefore the Exceptions are so ill taken, and withal so perplex'd and confus'd, it will be necessary briefly to state the Case itself; not with Design at present to settle the Point, but to shew the Weakness of the Authour.

The *Visitor* pronounced the Sentence by the Advice of the most eminent *Civilians* of this Nation; and the Arguments which possibly induced him and them to that Opinion were, as I conceive, such as these.

F

I. Probably

I. Probably it was thought that an University, and every College therein was a mixt Body, partly *lay*, and partly *Ecclesiastical*, and in all other Nations entituled to the Privilege of both *Forums*. And if all other Universities, *Generalia Studia* and Colleges were by certain and established Rules of the Canon Law sometimes entitled ^a *Ecclesiastical*, often mixt ^b and seldom or never Lay Societies, it seem'd more reasonable to take the Standard of those in *England* from other, many of them Protestant Colleges of the same Nature abroad, than from Hospitals and Lay Confraternities here at home. Especially since in all Charters and ancient Records of both Universities here in *England* their Members have usually been stiled ^c *Clerici*; and it hath been expressly by Charter granted; that concerning them the Kings *Prohibition* should not lye. The Universities, as they now *by Charter* send Burgessees to Parliament and are in that respect *lay*; so have they anciently sent Deputies to the Councils, particularly to that of *Constance*, and have been admitted as Ecclesiastical Societies. And therefore tho' at Common Law, no Lay Person was capable of Tithes, but the King; Appropriations however, were anciently made to Colleges, and that without Dispensation.

And tho' in Colleges of *Physicians* or *Lawyers*, this Rule may admit of Exception; yet in Societies, as that of *Exeter* College, where most are actually in Orders, and others design'd for them; it is impossible that the end of the institution and the quality of the Persons concurring, must not denominate the Society if not purely Ecclesiastical, at least not merely Lay. There is no more certain Rule in a Canon Law, than that a Corporation cannot be merely secular; where the Number of Ecclesiastical Persons equal the others, or exceed them. ^e And this Rule is still a greater Force, when the Society hath been erected and confirm'd by Ecclesiastical Authority.

^a Ab in c. *de Literis*.

[†] See Valsq. de Prada de Jure Eccl. Colle Salm. Over. b *Universitatem mixtum Sodalitium ac verum mixturâ verius decensiusque dici Ecclesiasticum, quàm profanum*. Chopin. ex Guilielmo de Dom. Fr.

^c 2. H. III. 5. Ed. III. 29. Ed. III. 14. H. VIII. See Prin. in 4. Inst. p. 36.

^d Panormitum c. ex lit. 16. Tus. t. 8. Con. 255. Mendo de jure Acad. Alphonso d' Escobar. c. 21. e Covar. l. 2. Var. c. 20. 8. Con. Alf. d' Esc. c. 21. Anton. Augustin. diss. l. 14. Epist. Jur. Can. l. 8. c. 9. Guim. de Pragm. Sanct. de univ. 307.

^a In *Dr. Patrick's Case*, *Moreton* holds, That most Colleges are Spiritual; *Windham*, That in some respect all Colleges to an elemmosynary end are Spiritual, in some Lay; and *Keeling*, That they were *quodammodo* Spiritual.

^b *A. 9. & 10. Eliz. Mich.* It was adjudg'd by all the Judges, *per opinionem omnium Justitiariorum utriusq; Banci & Capitalis Baronis Saccharii*; that *Trinity College* in *Cambridge* was in some respects Spiritual; and within the Statute of 1 and 2 *Phil. and Ma.* which make good devises to Spiritual Corporations.

And therefore Colleges, tho' not merely Ecclesiastical, yet out of a just caution, are excepted out of the Statute of *Chanteries*.

^c *Collegia instituta pro sustentatione studentium pauperum & aliorum egenorum sunt loca pia; & gaudent Privilegiis Ecclesie & de Jurisdictione Ecclesiastica & si sint instituta seu erecta Authoritate Ecclesiastica non solum sunt sola pia sed etiam Religiosa.*

It was laid down then probably upon these or the like Authorities, that an University was not merely a *Lay-Corporation*; and that Colleges being parts of the Body, and Coporations within a Corporation, were of the same nature as the whole.

2. If the Body then that was to be visited, was mixt: It was presumed that a mixt Jurisdiction, as sufficient for the redress of all Enormities therein was lodg'd in the sole Visitours thereof; and this more especially if the Person, from whom the Authority was deriv'd, could grant such Power; and the Offences, that were to be punished by the Visitour, could not be enquir'd into without it; and the Statutes (as is already prov'd) by plain and express words did convey and warrant it.

Now the Visitation which is an enquiry into several Breaches, not only of the Law of the Land; but of Ecclesiastical Laws, and as in this case into *Heresy*, can hardly be perform'd without the concurrent assistance of Ecclesiastical Jurisdiction. And therefore when *Ordinaries* are empower'd to enquire into the Foundation, Erection, and Governance of *Hospitals*, which are matters at first sight appearing Lay and Secular; ^d they are commanded to make Correction, and Reformation thereupon, after the Laws of *Holy Church*.

^a *Hill. 18. & 19. Car. 2.*

^b *Hob. p. 122. 9 Eliz. Dyer 285. Coke 11. Rep. p. 95. See Sid. 71. Widington's Case.*

^c *See Azo. l. 10. n. 26. tit. 1. l. 4. & l. 1. n. 3. tit. 18. l. 2.*

^d *See St. H. 5. 1.*

^a Not only the *Judices Academicarum*, but the *Conservatores* too abroad that represent the Visitours there; and the *Conservatores* of the *Templars* in England had always a mixt Jurisdiction.

And therefore says *Mendo*, *Visitatores* [of Colleges] *Episcoporum potestatem promulgandi censuras habent; quâ si carerent, vis plurima eis deficeret ad exequendum ea, quæ expedire judicantur. De Jure Acad. D. 7.* And so anciently in all Religious Houses which consisted most of Lay Members, and in the Visitation of them. *Cenobitica Visitatorum censura ad Abates pertinet.* [Dec. de Reg. c. 8. Chop. Monasticum, l. 1.

My Lord Coke thinks the *Ecclesiastical Law* proper to be us'd by a *Visitor* of all Societies founded in *Liberâ Eleemosyna*. Coke 1. Instit. 96. And this Power seem'd more necessarily lodg'd in the *Visitor*; because it is evident, ^b that those Fraternities whether *Religious* or *Lay*, that were once exempted from their *Ordinaries*, were immediately made subject to their *Visitor*; and the one Power was design'd to to supply the loss of the other.

It is plain that a College is within 2 H. 5. 1. Now then, if without a private appointment, it should be visitable, as some think, by the Ordinary of the place; or as the better opinion is, it should fall into the bulk of the University, and be subject to the Chancellours Visitation; in both these Cases, it would be visited especially in *Ecclesiastical Causes*, as the *Statute* appoints, according to *Holy Laws* of the Church; because both Persons confessedly have *Ecclesiastical Jurisdiction*. And therefore it seem'd not reasonable to suppose that a *Visitor* of a College *ex institutione*, vested with *Ecclesiastical Authority* by the Statutes, should have less Jurisdiction, than one who *ex provisione legis*, was call'd in to supply the want of him.

As to the Grant it is plain, That the King can exempt any place from Jurisdiction of the Ordinary, and subject it to another *Ecclesiastical* or *Episcopal Jurisdiction*. Co. 5. 1. 4. Cok. 5. 9. 10. 14. Dav. Com. 73. H. 1. Jac. B. R. Rot. 601. Rolls Ab. 341, 10. H. 7. 18.

If then *Ecclesiastical Jurisdiction* be necessary for the *Visitor* of a mixt Corporation; especially in Causes originally of *Ecclesiastical*

^a See *IV. 2. c. 43. Coke 2. instit. 455, v. exemptio. 6. H. 7. 14. Zerol 2. part. 60. Balsh. And. de Equitibus Hierosolymitanis. Gratian. disp. For. c. 870.*

See *Mendo l. 1. q. 26.*

^b See *Quarrant.*

Conufance; it muft be prefum'd that the Kings Grant to the Founder, for constituting a Visitour gave him Authority likewise of conveying to him fuch Powers which were neceffarily incident to his Office. The King now enjoys the fame Ecclesiastical Powers in this Nation, as the Pope once did; and in all other Countries it is own'd, That the *mixt* Jurisdiction is caft upon *Abbots* and other *Visitors*, not by Designation or Grant of the Pope, bat by the neceffity of their Office. [*Barb. de Jure Eccl.* l. 1 c. 17. *Suarez. de Rel.* l. 1. *Sanchez in summ.* l. 5.]

And laftly fince the Governours of the University have always exercis'd a mixt Jurisdiction; and the Charter of *Exeter* College entitles them to the fame Customs, as the University; it seem'd reasonable to fuppofe that the Visitour of a College had claim in his fmall Sphere to the fame Rights and Liberties, as the Chancellour in the University. *Cum Collegia fint partes & membra Academicæ fruuntur iisdem privilegiis quibus ea fungitur, præter alia specialia, quæ ipsis sunt concessa.* [*Mendo.* p. 25.]

And this prefumption is the stronger, becaufe in other Colleges, as well as *Exeter*, the Founders, relying on thefe Reasons, and on this Authority have exprefly granted to their Visitour the ufe of Ecclesiastical Cenfures: efpecially fince I find that the Visitors in *H.8's* time, in the University, tho not impow'ed by exprefs words of Commiffion us'd to punifh the Members thereof by *Ecclesiastical* Cenfures, as well as *Temporal*.

3. If The Body was *mixt*, and a *mixt* Jurisdiction was lodg'd in the *Visitor*; Then the Cause of the Sentence it felf being originally of Ecclesiastical Connufance, seem'd properly to direct the *Visitor* to the Ufe and Exercise of that Power. Herefie was chiefly charg'd againft him, and fully prov'd; the Contumacy receives its Nature from the Crime, and when the Principal whereupon it grew, was a Matter Spiritual; the Punifhment of it is of the fame *Forum*; and the Cenfures that enforce that Penalty, muft and ought to be Ecclesiastical: For *Cujus Juris est principale ejusdem Juris erit accessorium.* *Bract.* l. 5. c. 2. fol. 401. [See alfo *Hankford's Opinion*, 2 H. 4. 15.] And Ecclesiastical Procefs is allow'd not only in *Causis Spiritualibus*, but in *Spiritualitati annexis*, *Bract.* l. 5.

And it is a Rule in the Register, 53. b. *Ubi cognitio causæ principalis ad forum Ecclesiasticum pertinet; & ejus accessorium pertinere debet*, [*Dennis Case*, *Cro. Car.* 115.] And.

And therefore as Excommunication may be for *Defamation* and *Perjury*, so it may be us'd likewise for *Costs and Expences* adjudg'd which however *lay* in themselves are the Accessories and Dependences of those Causes. * For as *Perjury*, tho plainly in its Nature of Ecclesiastical Conusance, if it arose upon a Temporal Contract or Cause, is not triable in the Spiritual Court; so much more *Depriuation* (which is neither of it self Temporal or Spiritual, but undetermin'd) becomes an Ecclesiastical or Secular Punishment in respect of the Cause for which, and of the *Forum* in which it is inflicted.

I have offer'd these Reasons with all submission, not entering into the merits of the Cause; but laying down the probable Motives and Inducements to that Sentence: If a Bishop hath in every place Power of Excommunication in *foro animæ*, and if he hath mixt Jurisdiction in the College according to the Canon Law; and the Laws of the Land, he may then by Law inflict the Sentence; If he hath not such Power, The Custom of all other Universities and Colleges, the Nature of the Cause and of his own Power, the Practice of Visitors heretofore, and the plain Words of the Founder have *misled* him. But howsoever the Cause be determin'd by those learned Judges that it now lies before: Certain it is, that as the Visitor in this Case could not have a more *rude*, so he could not have a *weaker* Adversary. For whether the Bishop had ecclesiastical Jurisdiction or not, he could nevertheless, as Visitor, take away the Temporal Right. To excommunicate for *Rent* is a foreign and idle supposal; for Heresie is not *materia laica*; and therefore if the Authority was mistaken, the Cause however was Ecclesiastical. Nor is there any agreement between a Mannor and a College, between a *mixt* and a *lay* Corporation: As much is the Disparity between a Lord and a Visitor, where one hath connusance only of *Temporal* Causes, the other hath power to enquire into *Ecclesiastical* Offences. There is an apparent difference between *two* Jurisdictions and a *mixt* Jurisdiction; *two* Jurisdictions may occasionally and by accident be lodg'd in the same Person; as in the Bishop of *Durham*; but a *mixt* Jurisdiction, as arising from the Nature of the Cause, is always, not by chance but *necessity* vested in one Man, as in the *Chancellors* of both Universities. Now in one Cause the Original of

* *Fitz. Tir. Prot. M.*, 4. H. 3.

the Powers is wholly accidental, and therefore they ought not to interfere and be mixt; but in the other, that which was the reason of mixing the Jurisdiction, is as strong for maintaining them *undistinguish'd*, and *subservient* to each other. In one Case it is a Rule *Quando duo Jura concurrunt, æquum est ac si essent in diversis*; in the other, *Qui utroque Jure potest facere eundem actum utroque Jure fecisse videtur*; and therefore the Chancellor of Oxford having a *mixt* Jurisdiction, can by Charter, confirm'd by Act of Parliament, excommunicate the Mayor for breaking the Priviledges of the University. *Coveney's* Case makes nothing against this Opinion; for it is plain, that the Matter of the Deprivation, *i. e.* the *cause* of it was purely temporal; the Crime was not *Hereſie*, but *not entering into Orders*; the resolution that was there taken is clear; for it cannot be pretended that an Appeal in that Case lay from the Viſitor upon *Stat. 24. and 25. H. VIII.* as upon a Spiritual Sentence, and as from a Court merely Ecclesiastical; and upon that Ground the Opinion was confirm'd in *Dr. Lewis's* Case. How far there is ground for a *Prohibition* therefore in this Case, I will not dispute; but, tho the Excommunication should be allow'd to be void; tho the *alibi* in the Statute hath been already drawn into its full extent, yet I am confident, there it but one Man in *England*, whose Opinion we need not much value, that will dream of a *Præmunire*.

3. *As to the Vacancy of Dr. Hern's Place.*

That he may refute some what, it is usual with this Author to make Objections himself, which no body else ever mention'd; and then to shew his Skill in answer in them. For first he proves in *Dr. Hern's* Case, that *Obsequium Officium & Exercitium* cannot extend to an Ecclesiastical Benefice; no, nor was it ever pretended that they did; but I hope *Ecclesiasticum Beneficium*, in the same Statute will reach to it. Benefices indeed oftentimes are not reputed inconsistent with Fellowships, according to the intrinsic, but an estimated Value. The real Value is usually unsettled, and as depending upon Casualties, is *floating* and *uncertain*; therefore the incompatibility of a Living ought to be taken from fixt and certain *Rates*, and those appearing on publick Record. The Kings Books, 'tis always own'd, are such

such *Regia Monumenta*; and are not the Acts of Parliament as much *Publica Monumenta*? And is not, in the Letter of the Law, as well as in the intendment of the Legislator, the latter as good Evidence of the Value as the former? Now then, since an Annuity of 100*l.* is, besides many other Advantages, settled by Act of Parliament on *S. Anns*; is not this in the nature of the thing, as inconsistent as one of *Eight*? And hath it not a stated Value different from the intrinsic? And dothnot this appear in the most publick Records of the Kingdom? And is it not then ridiculous to say that the Living is not tax'd at 100*l. per Ann.* but the Parish is tax'd to make it 100*l. per Ann.* Nor can any Man that knew the Statutes of other Colleges in both Universities pretend, that this Precedent, however determin'd, can be of so universal influence. For since most of the Colleges in both Universities were founded before the making of the Records in the *First-Fruits Office*; All his Arguments for them that enforce a reference to those Records only, not by equitable Construction, but express Words, prove nothing but his Ignorance in the Chronology of those famous Foundations.

Thus much I have said for Argument only, since the *Author* after a tedious Discourse, hath as usually not touch'd the Point in question; And tho indeed his Reasons which have been shown to be very weak, would have tempted a Man to be of another Opinion; yet I freely confess, that as to all Livings which are at all rated in the *Kings Books*; and were, if not rated, then in being; The Statute seems naturally to refer it self to those Books only, and the *Publick Records* there mention'd may, (and as I think, and always thought) in strictness of Law ought to be generally taken under that limited and restrain'd Interpretation. But, as to all *new* Livings not then in being, and consequently not rated in their Books, since erected, and reduc'd to a settled Value by Act of Parliament. I take the Provision for them to be *Caus Omisus* in the Statutes, and which by equitable Construction, and by a competent Judge, *reducendus est ad expressum*. And therefore I further conceive, that the *Vice-Chancellor* having no Power of expounding the Statutes, did well declare, That the *Fellowship* and *Benefice* were not according to the Letter of the Statutes, inconsistent; and, that *Dr. Bouchiers* Opinion was at that time, in that place, well grounded: For the Statutes are to be observ'd,
secundum

*secundum planum & grammaticalem sensum, Reservata duntaxat præd-
Reverendo Patri & Successoribus suis Episcopis Exon justa emergen-
tium ex iisdem Statutis dubior' interpretatione;* and therefore the
Vice-Chancellor who was only let in as an Arbitrator between the
Rector and the *Fellows*, must be guided by the Letter of the Sta-
tute; but the *Visitor* having always a power of interpreting the
Statutes in his Visitation, and upon request, out of it, might law-
fully pursue the the well, intent, and plain design of the Law.
And therefore since in his Judgment, and according to the plain
intendment of the Legislator, now judicially declar'd, this was
reduc'd to the other ordinary Cases express'd in the Statute; The
Living was, and is plainly inconsistent with a Fellowship. And
at first indeed the Cognizance of the Cause being not so properly
a disagreement between *Rector* and *Fellow*, as a doubt arising
from the Statute, ought not to have been brought to the *Vice-
Chancellor*, but before the *Visitor*; and therefore the Matter being
never settled before a proper Judge, was now first judicially mov'd
and determin'd; I am well inform'd by Letter from Dr. Boucher,
and it appears in his Opinion it self, that he did at that time ad-
vise an appeal to the *Visitor*; and therefore the Reflection of this
Author upon him, upon this account, is as false, as is it rude and dis-
ingenuous.

As to his Residence it is plain, that the reason of a *Fellows* ab-
sence from the College beyond 50 days must be *Mors seu gravis infir-
mitus parentum*, or *causa promotionis*, and then a *tempus certum* must
be appointed; and leave must be given *habito respectu ad Causas
Personas intervalla locorum, & circumstantias ejusmodi*. When a
Fellow is then in hopes of preferment; this Statute allows absence
for attainment of it, and doth not limit the time, but proposes some
Rules for discretionary Limitation. But when he is *advanc'd*,
and hath for some Years had quiet Possession of a Parsonage; Then
it is this Gentlemans Opinion, that *Causa promotionis* signifies the
enjoyment of a Benefice, and that an indeterminate leave, perhaps
for Life, may be granted. The *Author* of the Account is sworn to de-
fend the Privileges of the University, and hath, and will perform his
Oath, But in the mean time he knows that the *Worthy Members* of that
learned Body desire not to elude the Statutes of their *Founders*, by so
scandalous and senseless *Evasions*; and that there are very few of them,

and those but in one College that will in this Case be more pleas'd with the fair Dealing of their new pretended Advocate; than they are hitherto satisfied with his Learning and Sense.

If then the Statutes will not excuse his Absence from the College; it is pretended that the Law will discharge him from Residence from his Parsonage. The Question is, whether Dr. Herne having a Parish in London, and being oblig'd to reside upon it, four Parts of five in a Year, can beyond that allow'd time of Absence be resident in Oxford. He answers, That Dr. Herne is excus'd from Residence, notwithstanding the Act of Parliament that enjoyns it, because by a subsequent act, 1 Jac. 2. The Rector is to have an House built at the Charge of the Parish; and therefore, till that be built, *Non-residence*, as involuntary, is no Crime; and in this Point he says, The Law is very clear. The Author was impos'd upon by a Case or two explanatory of 21 H. 8. It was doubted whether that Act oblig'd a Man to Residence only, in his Parish, or more particularly in the Parsonage House. If there was no House for the Parson, then the Incumbent is excus'd from that part of the Law which is impossible. For *impotentia excusat legem*; But as there is no impossibility for Residence in General, tho the House be not built, so neither do the Cases warrant or excuse *Non-Residence*. [See *Goodals Case*, *Coke* 6, p. 21. See *Cr. Eliz.* p. 590, 591.] And the *Canon Law*, which was the Ground of those Reports is clear in the Point, that he ought to live in the Vicinage, and not at forty seven Miles distance from his Parish in Oxford.

4. That the Visitor hath no Power by Statute of Suspending the Fellows *ab Officio & Beneficio*.

Upon this Head the Author declaims much, and long, and Dreams that the Suspension *ab Officio* especially, is so far from being warranted by Statute, that under the Pain of *Perjury* it cannot be submitted to by a Fellow. It would be easie to prove, that his Penalty being lets then *Expulsion*, may without express Words & Statutes be legally inflicted by the Visitor. Putting out of Com-

Barbosa de Offic. Par. p. 1. c. 8. n. 41. Debet Residere Parochus in domo Parochiali, ipsa deficiente, residere debet in domo aliqua que sit intra Parochie limites, & ita Ecclesia contigua ut commodè possit Ecclesia deservire. See Cock. de Jure & Just. p. 67.

Parochus non habens commodam habitationem in Parochia dispensatus est ut possit in loco vicino, residere Sess. Trid. 23. p. 216.

mons, is a *Suspension à Beneficio*, and of that, if they were worth any thing, Dr. *Bury* hath afforded us *Precedents*: Other Reasons might be suggested, were it not a very convincing one, that the Statute it self, which this *Gentleman* might have read, expressly enjoys this Punishment. *Etiamsi ad privationem aut amotionem Rectoris, Subrectoris vel alterius cujuscunque ab Administratione sua vel Officio procedat.*

5. *Whether the Visitor ought to have been Judge in his own Cause, or pronounc'd for his own Jurisdiction.*

It is said indeed, that is against Natural Equity to make a Man Judge in his own Cause, and that an Act of Parliament that should establish such a Practice, would be void: And this General Maxim, grossly mistaken, and misapply'd, hath impos'd upon this Gentleman. A Man that is not Judge of his own Cause, may, and every where does pronounce for his own Jurisdiction, and over-rule the Exceptions of the Criminal. When his Property is concern'd, a Judge must withdraw, but not when the Authority of his Court is question'd. *Quilibet Judex potest pronunciare pro seipso, quia licet illud non det ei jurisdictionem; tamen constituit ipsum in quasi possessione Jurisdictionis: propter quod habet justam cognitionem, & pronunciationem.* [Abb. in c. cum Ordinem in fine de resumpt. Mart. de Jurisd. c. 4. p. 2. & c. 18. n. 8.]

That the Concurrence of the Fellows to the Rectors Expulsion was not Statutable.

If the others had appear'd, they had not been suspended, and then they had been proper Judges; since they did not appear, and were justly punish'd, they became *Participes Crimnis*, & *Personæ Inhabiles*, and consequently in Law and Reason, as to any Exercise of Jurisdiction, were reputed *absent*.

He pursued therefore the Statute strictly, and the Expulsion of Dr. *Bury* was not more just in it self, than legally carried on. When those Fellows that had oppos'd the Jurisdiction of the *Visitor*, were statutablely suspended *ab Officio*; then it is very weak to talk of the Bishops taking in others, when the Statute had devolv'd the Authority on those that were in place nearest to them. And therefore the consent of no others could be had, than of such as were not incapacitated to give a legal Concurrence.

Lastly, the Contumacy is no statutable Cause of Expulsion, and if it were ought in the Case of the Fellows as well as the Rector, to receive the same Punishment from the Visitor.

If a Man had not been us'd to *like* arguing thro the Book, he would be surpriz'd at the last Exception in the close of it. *Contumacy* is not recited as one of the Crimes for which the *Rector* might be expell'd, and therefore is no good Cause of Deprivation; so that if a *Rector* when an *Heretick* and *Incontinent* made a *weak* Defence, he *might* be depriv'd, if he made *none*, he *must* be safe and secur'd.

Contumacy upon a Charge includes the Offence it self, and aggravates it, it amounts in Construction of Law to a *Confession* of the *Crime*, and to a *Contempt* of the *Judge*; and any Court that hath no Power of punishing it, hath in effect no Power at all. The Statute says, *Ostendantur ei detecta, quibus si non possit rationabiliter & honeste respondere, amoveatur*: and I leave this *Gentleman* to prove that a refusal of appearance before a *proper Judge*, is a sufficient Answer to a Charge.

As to the second Exception, it is clear, that the same *Contumacy* is not only respected in Law but the ground of it. When the charge is different; the *Contumacy* may be the *same*, but neither the *Crime* is, nor the *Punishment* ought to be *equal*. That which bears nearest resemblance to *Contumacy* in Common Law is *Outlawry*: *Outlawry* in *Trespass*, is no Forfeiture of Land, as *Outlawry* in *Felony* is; the *not-appearing* in both Cases is the *cause* of *Outlawry*, yet the Force of the *Outlawry* shall be esteem'd according to the heinousness of the Offence, which was the Ground and Foundation of the Process. His Lordship therefore had not equal Reason to expel the *Fellows* as the *Rector*, but wonders much that in the *Case of Exeter College*, the greatest exception against his Proceedings should be his tenderness to the *Fellows* thereof.

Thus the whole State of this Controversy hath been enquir'd into and settled, and thereby not only the *immaterial* Objections, which have already been made, are *answered*, but all *future Exceptions* are prevented. The Powers of a *Visitor*, as has been prov'd, are general, and not more fixt by private appointment, than ascertain'd by Law: *Appeals* from this *Domestick Judge* are by Statute taken away, but no recourse to him, either in this or any other *College*, hath ever been deny'd. It is evident then, that the *Commission* of *Appeal* was rightly granted, and it is equally clear, that the *Visitation* has been *Statutable* and *Legal*, and if (as is now plain) the *Jurisdiction* of the Judge was *certain*, and the *Process* *warrantable*, none of the Adversaries themselves will dispute the Justice of the Sentence.

A N
A N S W E R
TO THE
Account Examin'd.

Since the *Account Examin'd* is a Panegyrick on Dr. *Bury*, it is easie to discover the Author, and to find out the only Man in *England*, that would write well on that Subject. The *Answer* to it, as anticipated by M. *Colmlr*, will here be very short; especially, since the whole Pamphlet is at best only a bold denial of his own Crimes; and is oftentimes a Confession of the Charge. The Author of the *Account* had published nothing against him, but what was warranted by Authentick Vouchers; and it is not his fault if the faithful and exact History of a Mans Life, becomes the severest Satyr against him. Malice is ridiculously charg'd upon the Author against a Person wholly unknown: He knows no more of him, than of *Socinus*, or *Sandius*; but that his Principles are fully as bad; and his Learning much less. The little immaterial Exceptions, that are taken to the *Account*, are all false; but would for the most part be wholly impertinent to the purpose, if true. The great Inconstancy of which the Author of the *Account* is guilty, is that the Enormous Crimes of the Rector, are sometimes made the Cause of the Visitation; and sometimes the Discovery

covery of them is gloried in, as the Effect of it. The notorious Scandal was the Cause of the Visitation; and the Discovery of the Crimes by legal Proof, was the Result of it. The suspicion of *Herésie* and *Incontinency* was violent, and occasion'd the *Visitors* Enquiry: The Proof of the Charge was plain, and brought on the Decree of the *University*; Crimes may upon violent Presumptions be known before a Tryal; and yet the Tryal it self, and the Witnesses therein produc'd, must concur to the legal Conviction of the Criminals.

1. As to the *Naked Gospel*, It hath already been censur'd and burnt; and after the Decree of that *Learned* and *Judicious* Body upon so *Infamous* and *Heretical* a Book, it would be much more Prudence for him *once more* to recant his Tenets, than to defend them. For let his Friends of the *Polonian* Faith beyond Sea, know, That never any Decree was more unanimously sign'd, nor more willingly assented to by the Right Reverend, and Reverend the Heads, and the worthy Members of the whole *University*.

The manner of Christs Generation was not the Question, but his Divinity: And it is a very extensive Charity indeed, that takes in all Christians, but at the same time excludes Jesus Christ. If those bold Assertions (as he says) fell from him through Heat; I believe the same warmth continued, when he took *Am Sparrow* into his House; when he expell'd Mr. *Colmar*, and oppos'd the *Visitor*. When the Author calls *Jesus Christ* a Crucify'd Vagabond, he says, That *he personated an Infidel*; and the Vizard that then was put on, was not, I believe in the whole Book taken off.

If

If none under a Dean may read *Socinians Books*; it seems however, that one under that Degree may *write* them; and the Copies of the *Naked Gospel*, if fitted for Deans only, ought not to have amounted to 500. However, The Gentleman, I see, quotes Cantons which he never read; nor can it be well expected, That he should be acquainted with the Rules and Orders of a Church; who denies the Chief Articles of her Faith.

As to his *Immortality*: The Affidavits that were there made in the Visitation were my guides, and afterwards his own Confession hath confirm'd most of those Depositions. He boasts much of his Loyalty, which it is not my business to deny: The charge is *Heresie, Incontinence and Bribery*, and the Plea is; that he is not guilty of *Treason*. I am glad indeed that he is free from any one Crime, but at the same time it is hard, that a Man shall be excus'd for *Crucifying* his Saviour, because he is *Cæsars Friend*. It is not my business to look into his Life: The History of the Visitation I have strictly pursued, and even in that out of respect to his Character, omitted a very scandalous part of the Charge. It is the disingenuous task of other Men to publish *false and surreptitious Affidavits*: What I have at any time set forth hath been so clearly, and judicially prov'd; and wholly made out, that after all his Subterfuges, the Criminal himself dares not disavow it. For doth he deny that being then Pro-vicechancour *in auditu perfidiâ* (which are the words of the Decree) he oblig'd *Litchfield* by colour of his Authority to print the *Naked Gospel*? Is he the Author of that Heretical Treatise or not? did he call his Saviour *Crucifyd Vagabond*, or will he

he deny the charge? Doth he not own that he sat at St. *Athanasius* Creed? That he sold the Places and Offices of the College; and was guilty of Bribery and Extortion? In short, there is no part of the Charge, that is totally disavow'd but Adultery, and yet that crime too as it was clearly made out in Visitation; so since by supplemental Evidence is confirm'd. And therefore it is left to the World to judge, how far the Church, and Nation in general are oblig'd to the seasonable care of the University for censuring and burning that Blasphemous and Heretical Book; and to the Right Reverend the Bishop of *Exeter* for expelling the Author of it.

A
COPY
OF THE
PROCEEDINGS
OF
Dr. MASTER
UPON
The Commission of Appeal.

H



Reverendo admodum in Christo Patri ac Dom. Dom.

JONATHAN Permissione Divinâ Exon. Episcopo Collegii Exon. in Universitate Oxon. Patrono & Visitatori Ordinario, Edvardus Master Legum Doct. Vicar. vester in Spiritualibus Generalis & Commissar. vester in hac Parte special. constitut. omnimodas Obedientiam & Reverentiam Paternitati vestræ Reverend. Tenore præsentium innotescimus, significamus & certificamus, quæ Vigore & Virtute Commissionis vestræ mihi in hac Parte fact. & direct. & debet. cum Reverentiâ præsentat. & tradit. processum fuit, & est prout sequitur. (viz.)

Die Sabbati (viz.) Vicesimo secundo die Mensis Martii, Anno Dom. (Stylo Angliæ) 1689. inter horas nonam & undecimam ante Merid. ejusdem diei in Capella Collegii Exon. in Universitate Oxon. coram venerabili & egregio viro Edvardo Master Legum Doctore Reverendi admodum Patris Domini Jonathanis Permissione Divinâ Exon. Episcopi, Patroni & Visitatoris Collegii Exon. predict. Ordinarii Commissario vestro judicialiter seden. in præsentia mei Johannis Greeneway Notarii Publici subscript. in hac Parte specialiter assumpti. *

Negotium

*Negotium appellationis promotum per Jacobum Colmer Artis Magistrum Collegii Exon predicti. Socium contra Doct. Bury, ejusdem Coll. Rectorem George Verman Coll. predicti, Subrector & alios &c. Quibus Die hora & Loco coram prefato ven. & egregio Viro Edvardo Master Legum Doct. judicialiter seden. comparuit Thomas Wood Legum Bacc. ex parte Reverendi admodum in Christo Patris ac Domini Domini Jonathanis permissione divina Exon Episcopi Collegii Exon predicti. Patroni & Visitatoris ordinarii exhibuit Literas Commissionales ejusdem Reverendi Patris Patroni & Visitatoris predicti. prefato Edvardo Master Legum Doctori direct. quas eidem Ven. & egregio Viro Edvardo Master debita cum Reverentia tradidit & presentavit humiliter petens quatenus prefat. Edvardus Master onus Executionis earundem Literarum Commissionaliu in se assumere & acceptare & juxta vim formam tenorem & effectum earundem procedere & pro Jurisdictione sua seu potius vestra in hac parte decernere dignaretur quibus per eum debita simili reverentia receptis & publice tunc & ibid perlectis dictus Edvardus Master onus Executionis Literarum Commissionaliu hujusmodi ob honorem & Reverentiam dicti Reverendi Patris Patroni & Visitatoris Committen. &c. In se assumpsit & acceptavit & procedend fore decrevit in hujusmodi negotio appellationis juxta & secundum omnem vim formam tenorem & effectum earundem & Juris in hac parte exigentiam meque Jo. Greeneway No. Pub. in attorem scribam sive Reg. pro expeditione hujusmodi Negotii appellationis assumpsit tunc facta trina preconizatione pro dict. Arthur Bury S. Th, Professor. Coll. predicti. Rectore Georgio Verman Subrectore Ezra Cleveland, Thoma Lethbridge Richardo Hutchins, Benjamin Archer, Samuel Adams & Philippo Thorne sociis Collegii Exon predicti. ad interessend. istis die hora & Loco ultime citatis ad respondend. dicto Jacobo Colmer in hujusmodi Negotio appellationis comparuerunt Personaliter venerabilis Vir Arthur Bury S. T. P. Rector dicti Collegii necnon Georgius Verman Subrector ibid Ezra Cleevland, Thomas Lethbridge, Richardus Hutchins & Philippus Thorn sed Benjamin Archer & Samuel Adams non comparuerunt quorum penas Dominus reservavit in prox. Tunc comparuit Jacobus Colmer pars appellans & constituit Magistrum Thomam Wood Legum Bacc in ejus legitimum procuratorem ad agend. &c. quod statim in se acceptavit & fecit se &c. Tunc facta denuo trina preconizatione pro dict. Benjamin Archer & Samuel Adams eis-
que*

que non comparen. &c. dictus Wood in presentia Doctoris Bury, Georgii Verman, Ezræ Cleaveland, Thomæ Lethbridg, Richardi Hutchins & Philippi Thorn comparen. & in penam Contumaciæ dicti Archer & Adams absen. Loco Libelli exhibuit Protocol. appellationis quod Dom admisit quatenus de Jure &c. Deinde dictus Wood exhibuit Inhibitionem & Monitionem pro transmissione totius processus in hoc negotio habit & fact. & allegavit easdem fuisse & esse debite execut. juxta Certificat. authentic. sub sigillo Officialitatis Berks factaque deinde trina preconizatione pro dicti Archer & Adams non comparen. Dominus in penam non comparen. & in presentia comparen. monuit eos ad introducend. processum in prima hujus causæ instantia fact. &c. post merid & ulteriorem executionem dictæ commissionis continuavit & prorogavit ad publicam Cameram infra dicti Collegium Exon. notorie situat. inter horam secundam & quartam pomerid. hujus diei monitis partibus presen. ad tunc ibidem interessend. & in penam Archer & Adams non comparend. Cont. Cur. &c.

Eodem die inter horam Secund. & quartam pomerid. coram præfato Edvardo Master Legum Doctore Commissario antedicti in publica Camera in Collegio præd. pro Tribunal. seden. vocatis prius præfatis Doctore Bury, Georgio Verman, Ezra Cleaveland, Thom. Lethbridg, Richardo Hutchins & Philippo Thorn factaque trina preconizatione pro dicti Benj. Archer & Samuel Adams eisque non comparen. comparuit Wood Procurator dicti. Jacobi Colmer & in presentia dictor. Doctoris Bury, Georgii Verman, Ezræ Cleaveland, Thomæ Lethbridg, Richardi Hutchins & Philippi Thorn. Comparen. & in penam Contumaciæ dicti. Archer & Adams absen. petiit procedend. fore juxta formam retroactorum in presentia dicti. Doctoris Bury, Georgii Verman, Thomæ Lethbridg & Philippi Thorn exhiben. scriptum quoddam continens protestationes suas. manibus suis propriis subscript. & attestat. quod petierunt admitti & inactitari sic Incipiens in Visitatione Collegii Exon &c. Et sic terminans privilegiis nostris hac ex parte intemeratis quod scriptum Dominus ad eorum petitionem admisit quatenus de Jure sit admittend. & non aliter neque alio modo Interrogatis prius Magistris Ezra Cleaveland & Rich. Hutchins duobus ex sociis dicti. Colleg. Exon. Senior. an velint dicti. script. sive Protestationem attestari sub manibus suis dicti. Cleaveland & Hutchins expresse renuncian. & eidem non consentientibus. Tunc Dominus ad petitionem dicti. Doctoris Bury reservavit potestatem subscribendi dicti. Instrument dictis Archer & Adams absentibus si eidem Instru-

ment

ment. subscribere voluerint cum venerint. Postea Dominus non obstante protestatione præd. Doct. Bury, Georgii Verman, Thomæ Lethbridg & Philippi Thorn decrevit procedend. fore in hoc Negotio & monuit dict. Doctorem Bury aliosque comparen. ad introducend. processum in hoc Negotio juxta Monitionem eis Judicialiter fact. eis vero non introducentibus Dominus Wood accusavit Contumacias dictor. Doctoris Bury, Georgii Verman, Ezræ Cleaveland, Thomæ Lethbridg, Richardo Hutchins & Philippi Thorn in non transmittendo vel exhibendo processum in primâ hujus pretensæ causæ instantiâ habitæ & fact. & petiit sententiam ferri &c. dictis vero Doctore Bury, Georgio Verman, Thoma Lethbridg & Philippo Thorn alleg. quod virtute Stat. Collegii præd. processum in causa amotionis vel expulsionis teneantur procedere summarie & de plano & sine strepitu Judiciali eaque de causa nullum processum in Scriptis habuisse aut habere nec proinde posse exhibere nec ullum Stat. violasse. Tunc factâ denno trina preconizatione pro dict. Archer & Adams eisque non comparen. Dominus Wood in penam eorum contumac. & in præsentia comparen. obtulit Sententiam definitivam quam petiit admitti ferri legi & promulgari sed Dominus ad petitionem dictor. Doctoris Bury, Georgii Verman, Thomæ Lethbridg & Philippi Thorn continuavit & prorogavit ulteriorem expeditionem hujusmodi Commissionis & finalem auditionem hujusmodi Causæ in Diem Martis prox. inter horas Secund. & Quart. pomerid. ejusdem diei hoc in loco Monitis partibus tunc præsentibus &c. Cont. Certificatorio &c.

Postea Die Martis (viz) Vicesimo Quinto Die Mensis Martii Anno Dom. 1690. Inter horas tertiam & quartam pomerid. in hac parte Assignatas in publica Camera Colleg. Exon. præd. coram præfato venerabili & egregio Viro Edvardo Master Leg. Dict. Com. antedict. pro tribunal. seden. in præsentia mei Jo. Greeneway Not. Pub.

Quibus, &c. factâ trina præconizatione pro dict. Doctore Bury, Georgio Verman, Ezra Cleaveland, Thomæ Lethbridge, Richardo Hutchins, Benjamino Archer, Samuel Adams & Philippo Thorne Comparuerunt & Exhibuerunt Scriptum quoddam de novo continens protestationes suas manibus suis subscriptæ & attestatas (exceptæ Cleaveland & Hutchins) quod petierunt admitti & inactitari sic incipiens In vifitatione Collegii Exon. Et sic terminans protestantes irritum fore quicquid contra Acta nostra Statutum fuerit. Quod Scriptum petierunt admitti &c. Dominus admisit quatenus de Jure sit admittend. & non aliter

aliter neque alio modo: Tunc Dominus pronuntiavit pro Jurisdictione sua
Ec. Et Wood petiit processum coram eisdem fact. juxta Monitionem
introducend. fore Ec. Qui responderunt se non habere alium processum
quam qui Protestationi hac Die dat. annex. est Moniti deinde ad
proband. dict. processum ad petitionem Wood responderunt se non te-
neri Dom. judican. probare sufficere sibiipsis liquid. & verum.

Tunc dictus Wood obtulit & porrexit Dom. judican. sententiam
definitivam pro Parte sua, quam petiit admitti, ferri, legi & promulga-
ri in presentia dictorum Doctoris Bury, Georgii Verman, Ezræ Clee-
land, Thomæ Lethbridge, Richardi Hutchins, Philippi Thorne, Ben-
jamin Archer & Samuel Adams nihil peten. Dom. ad Petitionem
Dom. Wood admisit, tulit, legit & promulgavit Sententiam predict. sic
(ut permittitur) per dict. Wood oblat. & porrect. decernendo, pronun-
ciando, declarando, adjudicando, restituendo & in Expensis condemnando
ceteraque faciendo prout in eadem Sententia plenius continetur, presenti-
bus tum & ibid. Adolpho Meetkerk Coll. novi in Univeritate Ox-
on. Artis Magistra & Seymor Tredenham Collegii omnium animarum
in dict. Univeritate Juris Civilis Scholari Testibus ad premissa testi-
ficand. special. rogatis & requisit. in presentia mei Johannis Greene-
way Not. Pub. & Reg. assumpti, &c. super cujus quidem sententia
prolatione, &c. Dom. Wood requisivit pub. instrument. confici & in-
actitari.

Tunc Dom. Wood obtulit Billam expensarum quam petiit admitti
& taxari Dominus ad ejus petitionem taxavit eand. ad summam vigin-
ti Marcarum (facta prius fide perdict. Wood Client. suum exposuisse,
&c. & expositurum esse summam taxat) & Dom. assignavit pro solu-
tione dictarum expensarum in vel citra primum diem Mensis Maij prox.
& judicial. monuit Dominos Doct. Bury Georg. Verman Ezra Clee-
land Thomam Lethbridge Richardum Hutchins Philippum Thorne
Benjam. Archer & Samuel. Adams dict. sum. taxat, præd. Mro. Jacobo
Colmer seu ejus procurat. in vel citra diem præd. Tunc Dom. Wood
petiit sententiam executioni demandari partemq; suam actual. restitu-
ere & nomen suum in Libro promptuarii sive Registro dicti Collegii in-
scribere unde Dominus nomen Mr. Colmer inscripsit tum in ea parte Li-
bri prædict. qua primo deletum sive omissum fuerit tum in ea parte ubi
hoc die Nomina sociorum scribuntur & inseruntur.

Quæ omnia & singula sic (ut permittitur) Coram Vobis Gesta habi-
ta & facta vera esse Paternitati vestræ certificamus eademq; una cum Li-
teris

ad hoc noster Commissarius hanc litteram Mandato vestro Commis-
sarius Mentione pro pro. In originali una cum sententia nostra dis-
positis annex. Causam & sua Sigillo Vobis tradimus.
In cuius Rei Testimonium hac Literas Testimoniales sive hoc passum
publicum Inscribendum exinde confectum sigillo publico & authentico
Officialitatis Bursis sigillari & communiri & per Jo. Greenway
Not. Publ. Achor. nostrorum. in hac parte scribam subsignari & subscribi
fecimus Dat. secundo die Aprilis Anno Dom. 1690.

Edw. Master LL. Dre. dioceseos Exon Cancellarius.

Et ego prefatus Jo. Greenway Regia auctoritate Not. Publ. Quia pre-
missis omnibus & singulis dum sic [ut prefertur] coram Com. predicti
agebantur & fiebant, presens personaliter interfui Eaq; omnia & singula
sic fieri, vidi, scivi, audiui & in formam predicti. inactavi ac manu
mea propria scripsi & redegi Ideo nomen & cognomen meum subscripsi ac
signum meum tabellionate solitum & consuetum presentibus apposui in
fidem & Testimonium premissorum ad id specialiter rogatus & requisitus.

Ita Testor

Jo. Greenway Not. Publ.

These Proceedings being Printed off in haste, the Reader is desired to correct the Lin-
teral Errors therein; and these Errata in the Defence.

ERRATA.

Page 5, Line 24. after therefore dele that. p. 16. l. 11. dele are. p. 12. l. 12. r. Ex-
ter. p. 13. l. 1. dele qui. l. 2. dele or. p. 14. l. 6. r. provisional. l. 16. declared.
p. 15 l. 1. r. alii. p. 16. l. 2. r. Fellows. l. 18. r. propriety.

